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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents,
and
TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents,
and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,
v.
TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

JOINT APPENDIX

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I. RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

A. In The United States District Court For The District Of Nevada.

DATE	PROCEEDINGS
12/21/73	Filing Complaint of the United States of America.
01/23/74	Filing Motion to Intervene on behalf of Pyramid Lake Paiute Tribe, with proposed Complaint in Intervention and Memorandum of Points and Authorities in Support of Motion to Intervene attached thereto.
02/27/74	Filing Memorandum of State of Nevada Regarding Parens Patriae.
03/04/74	Filing Memorandum of Points and Authorities of Pyramid Lake Paiute Tribe of Indians Concerning Application of Parens Patriae.
03/18/74	Filing Answer and Cross-Claim of Truckee-Carson Irrigation District.
03/18/74	Filing Memorandum of Points and Authorities of Pyramid Lake Paiute Tribe of Indians in Response to the Position of the State of Nevada Concerning Parens Patriae.
08/15/74	Filing Answer of State of Nevada.
08/15/74	Filing Answer of Sierra Pacific Power Company.
08/15/74	Filing Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, Insofar as the State of Nevada is Sued in Parens Patriae.
09/30/74	Filing Response of the United States to the Motion to Dismiss the State of Nevada in its Parens Patriae Capacity.
10/01/74	Filing Response of the Pyramid Lake Paiute Tribe of Indians to the Motion to Dismiss the State of Nevada in its Parens Patriae Capacity.

DATE	PROCEEDINGS
10/04/74	Reply Brief of State of Nevada to Briefs Filed in Behalf of Proposed Intervenor Pyramid Lake Paiute Tribe of Indians on Question of Parens Patriae.
10/08/74	Hearing on All Pending Motions, including Motion to Dismiss as to the State of Nevada in its Parens Patriae Capacity.
10/15/74	Filing Order Granting Intervention of the Pyramid Lake Paiute Tribe of Indians.
02/07/75	Filing Memorandum Decision.
02/07/75	Filing Order: Pursuant to Memorandum filed simultaneously herewith, and GOOD CAUSE APPEARING; it is therefore ordered as follows: 1. That pursuant to Rule 42(b), F.R.C.P., this matter be set for trial before the court on the affirmative defenses of res judicata and collateral estoppel, said trial to commence on the 21st day of April, 1975, at 9:30 A.M. in Reno, Nevada. * * *. 4. The motion of the United States of America to amend its complaint to join as defendants Marvin Weishaupt, Charles Frey, Ray Nygren, David Andrulli, Earl Harriman, Joe Serpa, Jr. and Richard S. Lattin, individually and as representatives of that class of persons who are holders of water right certificates on the Newlands Reclamation Project, and who are members of the Truckee-Carson Irrigation District and the Truckee-Carson Irrigation District as a representative of said class, and to join as defendants that class of persons who are holders of water right certificates on the Newlands Reclamation Project and who are members of the Truckee-Carson Irrigation District, is GRANTED. . . .
05/02/75	Filing Order Granting Motion to Dismiss Action Against the State of Nevada Insofar as it Has Been Sued as Parens Patriae for its Citizens.

DATE	PROCEEDINGS
05/02/75	Filing Judgment of Dismissal, Dismissing Action Against the State of Nevada in its Capacity As Parens Patriae for its Citizens.
05/02/75	Filing Rule 54(b) Certificate. IT IS CERTIFIED: 1. That the Court has expressly directed the entry of final judgment on the motion to dismiss the action against defendant, State of Nevada, in its capacity as parens patriae for its citizens. 2. That the Court has expressly determined that there is no just reason for delay.
05/27/75	Filing Plaintiff-Intervenor's Motion to Strike or, in the Alternative, for an Early Determination of a Special Legal Question.
05/27/75	Filing Plaintiff-Intervenor's Memorandum of Points and Authorities in Support of its Motion to Strike or, in the Alternative, for an Early Determination of a Special Legal Question.
06/09/75	Filing Response of State of Nevada to Plaintiff-Intervenor's Motion to Strike or in the Alternative for an Early Determination of a Special Legal Question.
06/30/75	Filing Plaintiff-Intervenor's Reply Memorandum of Points and Authorities in Support of its Motion to Strike or, in the Alternative, for an Early Determination of a Special Legal Question.
07/31/75	Filing Memorandum Decision and Order Denying Motion. IT IS SO ORDERED that the Tribe's motion to strike and, likewise, as discussed above, the Tribe's motion for early determination of a special legal question is, and hereby are, DENIED.
09/23/75	Filing First Amendment to Answers to Truckee-Carson Irrigation District.

DATE	PROCEEDINGS
09/23/75	Filing Supplemental Answer.
11/17/75 through 11/21/75	Trial on Res Judicata and Collateral Estoppel Defenses.
11/24/75 through 11/25/75	Trial on Res Judicata and Collateral Estoppel Defenses.
01/26/76 through 01/30/76	Trial on Res Judicata and Collateral Estoppel Defenses.
02/02/76 through 02/04/76	Trial on Res Judicata and Collateral Estoppel Defenses.
03/22/76 through 03/25/76	Trial on Res Judicata and Collateral Estoppel Defenses.
03/29/76 through 04/02/76	Trial on Res Judicata and Collateral Estoppel Defenses.
04/02/76	Filing Findings and Order Concerning Defendants' Reliance on *Orr Ditch* Final Decree.
04/05/76 through 04/08/76	Trial on Res Judicata and Collateral Estoppel Defenses.
04/13/76 through 04/16/76	Trial on Res Judicata and Collateral Estoppel Defenses.
04/19/76 through 04/23/76	Trial on Res Judicata and Collateral Estoppel Defenses.

DATE	PROCEEDINGS
04/26/76 through 04/28/76	Trial on Res Judicata and Collateral Estoppel Defenses.
05/19/76 through 05/20/76	Trial on Res Judicata and Collateral Estoppel Defenses.
10/27/77 through 10/28/77	Post Trial Closing Arguments.
12/12/77	Memorandum Decision.
12/12/77	Findings of Fact and Conclusions of Law.
12/12/77	Judgment.
12/12/77	Certification under Rule 54(b) Federal Rules of Civil Procedure and under 28 U.S.C. 1292(b) and Stay of Further Proceedings.

B. In The United States Court Of Appeals For The Ninth Circuit.

DATE	PROCEEDINGS
04/15/80	Argued and Submitted.
06/15/81	Filing Opinion.
07/10/81	Order Amending 6/15/81 Opinion.
01/05/81	Order Amending 6/15/81 Opinion.
03/11/82	Order Denying Petitions for Rehearing and Rejecting Suggestion for Rehearing En Banc.

II. RELEVANT PLEADINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987BRT

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT; STATE OF NEVADA; ROLAND D. WESTERGARD, State Engineer of the State of Nevada; and all of the defendants named in the complaint of the United States in Civil No. R-2987BRT,
Defendants.

MOTION TO INTERVENE

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the Pyramid Lake Paiute Tribe of Indians moves to intervene as a plaintiff in this action in order to assert the claims set forth in its proposed complaint, which is attached to this motion, on the grounds that:

1. The Tribe has an interest in the subject matter of the action as the beneficial or equitable owner of the rights to the use of the waters of the Truckee River that are necessary to fulfill the purposes for which the Pyramid Lake Indian Reservation was created;

2. The disposition of this action will, as a practical matter, impair and impede the Tribe's ability to protect

that interest since, for all practical purposes, this suit will determine whether the Tribe is entitled to the use of sufficient water from the Truckee River to maintain and preserve Pyramid Lake and the lower reaches of the Truckee River as a fishery;

3. The Tribe's interest will not be fully and adequately protected by the existing parties;

4. The Tribe's claims and the main action have many common questions of law and fact; and,

5. Permitting the Tribe to intervene will not unduly delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987BRT

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT; STATE OF NEVADA; ROLAND D. WESTERGARD, State Engineer of the State of Nevada; and all of the defendants named in the complaint of the United States in Civil No. R-2987BRT,
Defendants.

COMPLAINT IN INTERVENTION

I

The Pyramid Lake Paiute Tribe of Indians is the governing body of the Pyramid Lake Indian Reservation located in the State of Nevada. The Pyramid Lake Paiute Tribe is a duly recognized Tribe of American Indians and has adopted a constitution and by-laws and, on November 21, 1936, was issued a corporate charter pursuant to the statutory authority provided in the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

II

Defendant Roland D. Westergard is the State Engineer of Nevada, the official responsible for administering the State's water laws and for issuing permits authorizing the appropriation and diversion of water from the Truckee River. All of the other defendants named in this com-

plaint in intervention are also named in the complaint of the United States and are described generally in paragraphs II and IX of that complaint.

III

The Truckee River is a navigable stream. It originates in California in the Sierra Nevada mountains and flows into Lake Tahoe. After leaving Lake Tahoe, the Truckee River flows for approximately 20 miles through the State of California and then crosses into the State of Nevada, where it flows for approximately 65 miles passing through the cities of Reno and Sparks and emptying into Pyramid Lake.

IV

Lake Tahoe has a natural surface elevation of approximately 6,223 feet above sea level. At the outlet of the lake is a dam owned by the United States and operated by the Truckee-Carson Irrigation District pursuant to a contract with the United States. The dam permits storage of approximately 750,000 acre feet of water by raising the natural level of Lake Tahoe approximately six feet to elevation 6,229 feet above sea level.

V

Pyramid Lake is a desert lake in Nevada approximately 30 miles north of Reno, Nevada. It is a unique national resource both from the standpoint of its beauty and as the natural habitat of both fish and wild fowl which rely upon the lake for existence and protection. It is the natural terminus of the Truckee River and has no outlet. Its surface elevation is now approximately 3,800 feet above sea level. It is now approximately 20 miles long and has a maximum depth of 335 feet. With the exception of a small amount of direct precipitation and drainage from the low lying mountains surrounding it, its sole source of water is the Truckee River. A flow of between 375,000 and 400,000 acre feet of water per year on the

average from the Truckee River into the lake is required to replace evaporation losses, and thus to maintain the present level of the lake. Since 1905, the average flow into the lake from the Truckee River has been approximately 250,000 acre feet, leaving an annual deficit of between 125,000 and 150,000 acre feet. As a result of diversions of water from the Truckee River, the level of Pyramid Lake has dropped more than 70 feet since 1906, destroying fisheries, threatening extinction of the species of trout native to the lake, increasing the salinity of the lake, causing land erosion, and threatening the continued existence of the lake as a useful and viable body of water.

VI

Members of the Pyramid Lake Paiute Tribe of Indians have lived on the shores of Pyramid Lake from time immemorial. They have fished in the lake and have used the fish for food and for barter. They have aided their support by charging fees to sportsfishermen for licenses to fish in the lake. They have relied upon water from the Truckee River for irrigation, for domestic uses, for maintenance of the lower segment of the Truckee River as a natural spawning ground for lake fish and for maintenance of the lake as a viable fishery. Pyramid Lake and the Truckee River are, and always have been, primary elements of the environment in which the Pyramid Lake Paiute Indians live and are, and always have been, essential to their survival and welfare.

VII

On November 29, 1859, the Department of the Interior directed that an area including Pyramid Lake and the lands surrounding the lake, together with the Truckee River and the valley along the Truckee River from the mouth of the river upstream to a point approximately 2 miles south of Wadsworth, Nevada, be reserved and set aside from the public domain as the Pyramid Lake Indian

Reservation. This reservation was confirmed on March 23, 1874, by an executive order signed by President Grant. The area was reserved for members of the Pyramid Lake Paiute Tribe of Indians primarily because it constituted their aboriginal home and the lake provided a large fishery which was intended to be the principal source of the Tribe's livelihood and subsistence in perpetuity.

VIII

The United States of America offered to the Pyramid Lake Paiute Tribe of Indians, and the Tribe accepted, the Pyramid Lake Indian Reservation as a permanent home and abiding place as part of the consideration for a relinquishment by the Pyramid Lake Indians of a vast area which was part of their ancient homeland. A covenant between the United States and the Pyramid Lake Indians was thus consummated, pursuant to which there was established in perpetuity a viable community with a sound environment and adequate resources for its maintenance and subsistence, including Pyramid Lake and rights to the use of the waters of the Truckee River for the continuance and preservation of the lake, for fisheries, and all other purposes required to accomplish the objectives for which the Pyramid Lake Indian Reservation was established.

IX

In establishing the Pyramid Lake Reservation in 1859, there was, by implication, reserved for the benefit of the Pyramid Lake Indians sufficient water from the Truckee River for the maintenance and preservation of Pyramid Lake, for the ~~the~~ maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish, and for the other needs of the inhabitants of the Reservation such as irrigation and domestic use. The Pyramid Lake Paiute Tribe of Indians claims the equitable or beneficial title to these rights with a priority date of November 29, 1859.

X

Under the authority of the Reclamation Act (Act of June 17, 1902, 32 Stat. 388), the Secretary of the Interior on March 14, 1903, approved the construction of the Newlands Reclamation Project, originally known as the Truckee Project. A diversion dam on the Truckee River, known as Derby Dam, was completed by June of 1905. As part of the Newlands Reclamation Project, water is diverted from the Truckee River at Derby Dam near Wadsworth, Nevada. A small percentage of the water is used for irrigation within the Truckee Division of the Newlands Project; most is transported into the Carson River watershed in Nevada to supplement waters of the Carson River for irrigation in the Carson Division of the Newlands Irrigation Project. The water exported from the Truckee River watershed to the Carson River watershed is either stored in Lahontan Reservoir with waters from the Carson River for later use or used immediately for irrigation in the Carson Division of the Newlands Irrigation Project. The Newlands Irrigation Project works are owned by the United States but are operated by the Truckee-Carson Irrigation District under a contract with the United States dated December 18, 1926, as amended. On September 14, 1973, the United States Secretary of the Interior mailed notice to the Truckee-Carson Irrigation District that this contract is being terminated for violations of its terms. Diversion of Truckee River water to the Newlands Reclamation Project is the principal cause of the decline of Pyramid Lake and the destruction of its fisheries.

XI

Drainage from the Carson Division of the Newlands Project is used in the Stillwater Wildlife Refuge, which was designated as a national wildlife refuge in 1948. The refuge is owned and operated by the United States, pursuant to that certain Tripartite Agreement dated November 26, 1948, by and between the Truckee-Carson Irrigation District, the State Board of Fish and Game

Commissioners of the State of Nevada, and the Fish and Wildlife Service of the Department of the Interior, and in accordance with the Migratory Bird Conservation Act (45 Stat. 1222), as amended.

XII

The Washoe Project Act of August 1, 1956, (70 Stat. 775) authorizes the Secretary of the Interior to construct, operate and maintain the Washoe Reclamation Project for purposes of irrigation of lands in the Carson and Truckee River Basins, for providing drainage service to lands therein, controlling floods, providing hydroelectric power and for other beneficial purposes. The Act also provides for the development of the fish and wildlife resources of the project area, including facilities to permit increased water releases from Lake Tahoe and restoration of the Pyramid Lake fishery. Under the provisions of this Act, Stampede Reservoir has been constructed in California on the Little Truckee River, a tributary of the Truckee River.

XIII

The Pyramid Lake Paiute Tribe of Indians contends that nothing in the Reclamation Act, the Migratory Bird Conservation Act, or the Washoe Project Act authorizes any diversion of water from the Truckee River that would interfere with the right of the Pyramid Lake Paiute Tribe of Indians to the use of sufficient waters of the Truckee River to fulfill the purposes for which the Pyramid Lake Indian Reservation was created, including the maintenance and preservation of Pyramid Lake, the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish, and other purposes beneficial to, and satisfying the needs of, the Pyramid Lake Indians.

XIV

It is the further contention of the Pyramid Lake Paiute Tribe of Indians that defendants' diversions of the flow of the Truckee River that impair its navigability, includ-

ing its ability to maintain and sustain a fishery, are unauthorized and contrary to law.

XV

On February 3, 1913, the United States brought an action entitled *United States v. Orr Water Ditch Co., et al.* (Equity No. A-3) in the United States District Court for the District of Nevada, to determine the quantity of water the United States could divert from the Truckee River for the Newlands Project, to adjudicate the claims of numerous Nevada claimants, and to assert a right to the use of Truckee waters for irrigation on the Pyramid Lake Indian Reservation. No rights to water for the maintenance and preservation of Pyramid Lake or for maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish were at issue in the suit.

XVI

In September 8, 1944, a decree was entered in the case of *United States v. Orr Water Ditch Co., et al., supra.* This decree recognized, subject to prior rights, the right of the United States to use Truckee River water for the Newlands Project, recognized numerous rights within the State of Nevada to the use of waters from the Truckee River and recognized the right of the United States to use Truckee water for irrigation of lands on the Pyramid Lake Indian Reservation with a priority date of December 8, 1859.

XVII

The Pyramid Lake Paiute Tribe of Indians was not a party to the *Orr Water Ditch* litigation. The United States purported to represent the interests of the Tribe while it also represented the interests of the major adverse claimant to Truckee River water, the Newlands Reclamation Project. This conflict of interest of the United States in the *Orr Water Ditch* litigation prevented the Tribe's rights claimed in this action from being fully and fairly litigated. The Pyramid Lake Paiute Tribe of Indians contends that it is not bound by the *Orr Water*

Ditch decree, and that the decree does not foreclose recognition of the rights now asserted by the Pyramid Lake Paiute Tribe of Indians and the United States.

XVIII

On Information and belief, it is alleged that water in excess of the amounts actually needed and in excess of the amounts decreed are used on lands within the Newlands Reclamation Project, on upstream lands that are irrigated from the Truckee River, and by municipal and industrial water users using waters from the Truckee, all to the detriment of the Pyramid Lake Paiute Indians.

XIX

The State of Nevada and defendant Roland D. Westergard have refused to recognize any right of the United States or the Pyramid Lake Paiute Tribe of Indians to the use of waters of the Truckee River for the maintenance and preservation of Pyramid Lake. The State of Nevada, acting through its State Engineer, has issued permits for the appropriation of waters from the Truckee River which are in derogation of rights to the use of the water for the maintenance of Pyramid Lake and the lower reaches of the Truckee River as a fishery. The Pyramid Lake Tribe's rights to the use of Truckee River water asserted in this action are currently being violated contrary to the following provisions of the United States Constitution: (1) The Supremacy Clause, Art. VI; (2) The Property Clause, Art. IV, Sec. 3; (3) The Commerce Clause, Art. I, Sec. 8, Cl. 3; (4) The Fifth Amendment; and (5) The Fourteenth Amendment.

WHEREFORE, the Pyramid Lake Paiute Tribe of Indians respectfully prays this Court:

1. To quiet the equitable or beneficial title of the Pyramid Lake Paiute Tribe of Indians to the use of sufficient waters of the Truckee River to fulfill the purposes for which the Pyramid Lake Indian Reservation was created, including the maintenance and preservation of

Pyramid Lake and the lower reaches of the Truckee River as a fishery and for other purposes beneficial to and satisfying of the needs of the Pyramid Lake Indians, now and in the future, with a priority of November 29, 1859, and to set the measure of this right in acre feet per year and rates of flow at specified times of the year, and to determine its relative priority with respect to other rights to the use of the waters of the Truckee River;

2. For an injunction restraining the defendant Roland D. Westergard, in his capacity as Engineer of the State of Nevada, from issuing permits for the appropriation of water from the Truckee River which infringe upon or are in derogation of the rights to the use of water asserted herein by the Pyramid Lake Paiute Tribe of Indians;

3. For an injunction restraining the defendant Roland D. Westergard from administering the laws of the State of Nevada and the waters of the Truckee River in any manner so as to limit, infringe upon or impair the rights to the use of the waters of the Truckee River asserted by the Pyramid Lake Paiute Tribe of Indians in this action;

4. For costs of suit; and,

5. For such other and further relief as shall appear proper.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987BRT

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT; STATE OF NEVADA; ROLAND D. WESTERGARD, State Engineer of the State of Nevada; and all of the defendants named in the complaint of the United States in Civil No. R-2987BRT,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

I

A. The Tribe's application meets the requirements of Rule 24(a) of the Federal Rules of Civil Procedure for intervention as of right. The Tribe has an interest in the property that is the subject of the litigation, namely, the waters of the Truckee River, as shown by its Complaint in Intervention as well as the Complaint of the United States. That interest obviously stands to be affected by the disposition of this case. See *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967); *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967); *Sohappy v. Smith*, 302 F.Supp. 899 (D. Ore. 1969).

B. Rule 24(a) also requires that the interest of the applicant for intervention is not adequately represented by the existing parties. See *Trbovich v. United Mine Workers, supra.; Wilderness Society v. Morton, supra;* and *Nuess v. Camp, supra.*

The interest of the Pyramid Lake Paiute Tribe of Indians is not fully and adequately represented by the United States. *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F.Supp. 252 (D. D.C. 1973) and 360 F.Supp. 669 (D. D.C. 1973); *United States v. Alpine Land and Reservoir Co.,* 431 F.2d 763 (9th Cir. 1970), *cert. denied sub nom., Pyramid Lake Paiute Tribe of Indians v. United States,* 401 U.S. 909; President's Message on Indian Affairs, 116 Cong. Rec. S.10894 at 10896 (July 9, 1970), also published 1970 U.S. Code Cong. & Admin. News 2965 at 2972 and H.R. Doc. No. 91-363, 91st Cong., 2d Sess., 9-10 (1970); Hearings on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92nd Cong. 1st Sess., Part 1 at 229, 231, and 241-242 (1971), and Part 6 (1972).

C. In addition, since the United States was, but the Tribe was not, a party to the *Orr Water Ditch* litigation, the *Orr Water Ditch* decree may not have res judicata or collateral estoppel effect as against the Tribe even if it is binding against the United States. (See Tribe's Complaint, paras. XV-XVII for allegations relative to *Orr Water Ditch* litigation.) Thus, the Tribe has a separate and distinct position to maintain and a final resolution of the controversy regarding rights to the use of Truckee River water requires the Tribe's full participation as a party.

II

The Pyramid Lake Tribe should be permitted to intervene. (See Rule 24(b) of the Federal Rules of Civil Procedure: 3B Moore's Federal Practice, para. 24.10 [1 and

2] (1969 ed.); *Nuesse v. Camp, supra.*, and *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al,*
Defendants.

MEMORANDUM OF STATE OF NEVADA REGARDING PARENS PATRIAE

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I. INTRODUCTION

Pursuant to indicated desire of the Court, the State of Nevada respectfully submits the following brief on the subject of parens patriae, sometimes hereinafter simply referred to as "parens". The Court indicated at the meeting with counsel on January 28, 1974, that it would be helpful to have briefs filed on this subject, so that the Court might be advised early in the game on this question. At the time of the meeting, none of the defendants had been served with process, and at the present time certain of the defendants have now been served, including the State of Nevada. However, by Court Order all defendants (except as to Truckee-Carson Irrigation District) have until August 15, 1974, to answer or otherwise plead. Until all parties have been served, it seems difficult to bind individual party defendants respecting the parens question on which they may desire and be entitled to be heard pro or con. However, the parens question having been raised in the plaintiff's complaint and by the proposed intervenor, the Pyramid Lake Paiute Indian Tribe, it does appear beneficial to orderly disposition of the case to consider this matter now, on a preliminary basis. We feel, however, that before this consideration might be enlarged into the nature of a binding order, that Motions should be made by those who might contend for the various positions and viewpoints, and that such Motions should be disposed of according to the usual practices of the Court. We believe that the formal handling of this question should be delayed until all the defendants are served or have appeared and are required by orders of the Court and the form of Summons to answer or plead.

II. SUMMARY OF ARGUMENT

1. The State of Nevada cannot be required to appear in this case as a defendant in parens patriae. Whether or not the State of Nevada might desire to be named as a defendant or even a plaintiff in this action in the

capacity of parens patriae is a matter of option and right to be exercised by the State.

2. Should the State of Nevada elect to appear in this action in parens patriae, then such appearance and the effect of judgments and decrees of this Court would be limited to the general public interests of the State apart from the individual interests of any private property owners who are named as defendants.

3. The State of Nevada cannot appear or be retained in the case in a parens patriae capacity wherein the State would represent the private property owners (who are the defendants in this case), so that a judgment against the State would bind private property owners as to their individual property rights. Parens patriae jurisdiction in the sense of representing individual property rights cannot be conferred upon the State, even if the State desired to have such jurisdiction conferred upon it. Water rights are real property rights in Nevada, and must be asserted or defended by the individual owners of the rights.

III. ARGUMENT

1. The State of Nevada has not yet determined what position it might take in respect to parens patriae. It is the intention of the State, after determining its position, to file necessary pleadings so that its position can be adjudged by the Court and clarified. However, at this stage of the proceedings, it will undoubtedly be helpful to explore those guidelines applicable as a matter of law to the position that the State can and will have to take. There are certain definite legal limits which will govern what the State can do.

2. Examination of authority does not disclose any relevant cases where a State of the Union was required to be a defendant in the capacity of parens patriae in an action of this nature, with the following exceptions:

None of the exceptions presents a state as parens according to the usual definitions. The exceptions are:

(a) Interstate water adjudications where the states are not really in parens patriae, but rather are acting as sovereigns with the status of independent nations in the same manner as the United States might act with regard to another country. The within case, however, is not a case involving equitable apportionment of an interstate stream, but rather is wholly confined to water uses within the State of Nevada. Hence for that factual reason alone, in any event, the interstate water apportionment cases do not apply to the within case, so as to cause the State of Nevada to be in parens for its individual citizens.

(b) Boundary disputes between states. This is not a boundary dispute and, again, in such cases it appears that the states are acting as sovereigns under the Constitution and not in a sense of parens or "parent". Change of boundary line between states does not affect the individual property owners, who may own lands on one side or the other of a state boundary anyway. Boundary cases raise no issue as to the capacity of a state to seek relief or be sued because the state is acting in a sovereign capacity and not on behalf of any individual citizen.

3. The evolvement of the theory of parens patriae and its present status is described in Malina and Blechman, *Parens Patriae Suits for Treble Damages under the Anti Trust Laws.* 65 Nw. U.I.Rev. 193 (1970), and in *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 Col. L.J. & Soc. Prob. 411 (1970), and by Justice Marshall in his Opinion in the United States Supreme Court in the case of *State of Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 92 S. Ct. 885, 31. L. Ed. (2d) 184 (1972). The term parens patriae has two quite different connota-

tions, deriving historically from two entire separate bodies of authority:

(a) The first deals with the application in this country of the so-called "Royal Prerogative" exercised by the King of England with respect to charities and specified types of incompetents.

(b) The second line of cases is of American origin and bears on the propriety of suits by a state to *protect* certain of its own *interests* in its so-called *quasi-sovereign capacity.*

4. Under the Royal Prerogative theory, the King retains certain duties and corresponding powers as "father of the country" or parens patriae. With the American Revolution, these powers of the English King passed to the governments of the various states and, in part, to the federal government. Blackstone speaks of the King as "the general guardian of all infants, idiots and lunatics," with general superintendence of "all charitable uses in the kingdom." This definition of parens patriae jurisdiction refers to infants, juveniles, mental incompetents and those who are unable to take care of themselves or protect themselves.

This type of parens patriae jurisdiction has been largely assumed by the states. However, its needs have been met by such things as "provisions for court-administered guardianships," *California v. Frito-Lay, Inc.*, 474 Fed. 2d 774 at 776 (Ninth Circuit, 1973), juvenile jurisdictions and other procedures which generally are designed to take care of disabled members of society. See also, the use of the term parens patriae in respect to the criminal law involving protection of public interests and of the right to incarcerate a juvenile who has committed a crime. *Johnson v. State*, 114 A.2d 1 (1955) at page 5:

"This parens patriae jurisdiction is a right of sovereignty and imposes a duty on the sovereignty to protect the public interest and to protect such persons with disabilities who has no rightful protector."

This view of parens extends a power to the State and imposes a duty to infants and incompetents and other persons under disability, but is much broader and extends to "the personal liberty of persons who are under a disability whether by reason of infancy, incompetency, habitual drunkenness, imbecility, etc." *Johnson v. State*, supra, at page 5.

In *Calif. v. Frito-Lay*, supra, Judge Merrill indicates that if a state undertakes to represent individuals who are the disabled members of a class, it is really acting as a guardian ad litem, rather than in parens. Judge Merrill finds that although there are citizens who may not be able to secure relief by means other than having the state sue for their individual rights, and that the representation of them by a state is a worthy aim, this "is not the type of state action taken to afford the sort of benefit that the common law concept of parens patriae contemplates," *Calif. v. Frito-Lay*, supra, at page 777.

> "If a state is to be empowered to act in [this] fashion . . . we feel that authority must come not through jurisdictional improvisation, but by legislation and rule making where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems possessed by *one's assertion of power to deal with another's property and to commit him to actions taken on his behalf.*", *Calif. v. Frito-Lay*, supra, at page 777.

> "We conclude that the authority of the State to act . . . as representative of its citizens cannot be founded on its common law capacity as parens patriae." *California v. Frito-Lay, Inc.*, supra, at page 778.

While the *Frito-Lay* case involves the effort by a state to represent individual citizens under the Clayton antitrust law, the definition of what parens patriae is at law is well defined and would seem to apply whether a state

is plaintiff or defendant. No authority has been found, however, where a state has been required to act as defendant.

U. S. v. Union Pacific, 98 US 569 (1878) is a case where the United States sought to sue in parens to prevent looting of the corporation. Although a special act was passed by Congress, permitting the suit, the Supreme Court denied that the United States could sue in parens on the basis that there was no trust relationship between the railroad company and the United States. Malina and Blechman state at page 202 of their article that the Government's argument in Union Pacific.

> "marks the furtherest extent to which this branch of the royal prerogative has been stretched."

In *Kansas v. U. S.*, 204 US 331 (1907), the Supreme Court refused to allow a suit by the State of Kansas as trustee for a railroad on the ground that the action was for the benefit of the railroad and that consequently the state was not the real party in interest. See also additional cases making the distinction between suits in behalf of private interests and suits relating to the quasi-sovereign interest of a state: *Oklahoma v. Atchison, Topeka and Santa Fe*, 220 US 277 (1911) and *Georgia v. Pennsylvania Railroad*, 324 US 439 (1945).

The conclusion must inexorably be reached that the State cannot, under parens patriae used in the Royal Prerogative sense, be sued as a representative of individual citizens or individual property rights.

5. The second line of cases regarding parens relate to the propriety of suits *by* a state, *as plaintiff*, to protect certain of its own interests in its so-called quasi-sovereign capacity. These cases have largely developed in a series of decisions dealing with the Supreme Court's original jurisdiction to hear controversies between states or between a state and a citizen of another state.

"Quasi-sovereign capacity" (or "interest") is a term which refers to certain legal rights that belong not to any specific individual or individuals, but to the populace, or a large portion thereof, generally, and has included "the health, comfort and welfare of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state." *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 at 1089, *State Protection of the Economy and Environment*, supra.

> "It was not until the end of the 19th Century that states began to premise their suits upon the general health, safety and welfare of their populations—interests which a private party would not have standing to raise." Malina and Blechman, supra, at 203.

These suits represent protection of the type of interests which sovereign nations would have a duty to protect. In *Louisiana v. Texas*, 176 U.S. 1 (1899), the Supreme Court stated at page 19:

> "The cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of *affect her citizens at large.*" (Emphasis supplied)

Elsewhere in this opinion, the Court noted that

> "[The] gravamen [of the bill] is not a special or peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of parens patriae, trustee, guardian or representative of all of her citizens." (At page 19)

In *Louisiana v. Texas*, supra, the Court, at page 19, quotes with approval from *In Re Debs*, 158 U.S. 564, 586 (1895):

> "While it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties"

There are two basic requisites to the quasi-sovereign aspect of parens that must exist before the state may exercise such power:

> "first, the sovereign (or quasi-sovereign) interests to be *afforded judicial recognition must be related to corresponding duties owed by the sovereign to its citizens; and second, the wrong complained of must 'affect the public at large,' not merely the interests of particular individuals.*" (Emphasis supplied) Malina and Blechman, supra, at page 205.

We must ask in the instant case if there is an absolute duty on the state to act in person, or rather whether the questions presented give the state an option to determine if its quasi-sovereign interests are affected and thus to elect to enter the suit on that basis or not. We must ask in the instant case if the "public at large" is affected or only certain individual property rights, to determine if the quasi-sovereign interests of the state are affected.

This distinction between the parens jurisdiction of a state in protecting its quasi-sovereign interests, as opposed to actions in regard to individual property rights or claims, is well defined by Justice Marshall in the

Hawaii v. Standard Oil Company case, supra, at page 258 in 405 U.S.

> "This Court recognized that Louisiana in the *Louisiana v. Texas* case, supra, was attempting to sue, not because of any particular injury to a business of the State, but as parens patriae for all of her citizens."

A long series of cases cited by Justice Marshall in the Hawaii case establish the right of a state to *sue* as parens patriae to prevent or repair harm to its quasi-sovereign interests.

In *Minnesota v. Benson*, 274 F.2d 764, (Court of Appeals District of Columbia, 1960), Minnesota contended that a large part of its milk found a market beyond Minnesota and attempted to sue in behalf of her citizens and as representatives of her dairy industry adversely affected by milk marketing orders. The Court at page 766 states in answer to this contention:

> "We are of the view that the U.S. rather than Minnesota occupies a relationship of parens patriae to those who are said here to be adversely affected or aggrieved by this order issued by the Secretary."

In *Illinois v. Milwaukee*, 406 US 91, 96 (1972), the Court approves language in *New York v. New Jersey*, 345 US 369 at 372:

> "The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depends upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could in effect be drawn into an intramural dispute, over the distribution of water within the Commonwealth."

This case shows a distinction between individual water rights within a state, as opposed to the rights of the state itself.

In *Land O' Lakes v. Louisiana*, 160 F. Supp. 387 (1958) the State of Minnesota endeavored to intervene as a party plaintiff to represent the interests of all dried milk manufacturers in Minnesota who were not parties to the suit. The question is framed in a little different fashion than parens, but it appears to be the same thing, being, has Minnesota a justiciable interest? The Court finds:

> "Such an interest is lacking when a state undertakes to sue for the particular benefit of a limited number of its citizens. In such a posture the state is a 'mere volunteer'. The state must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest. Apart from direct proprietory rights . . . a State may have such an interest only by virtue of its duty to protect the general welfare as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens." *Land O'Lakes v. Louisiana*, supra, at page 388.

In the *Land O' Lakes* case, Minnesota contended that milk was of such importance to Minnesota and its citizens that restriction on interstate distribution would directly and materially affect the welfare of the people of Minnesota. The Court says:

> "That before a state has standing to sue parens patriae it must be shown that the interest asserted materially affects the health and welfare of *all* the people of the state or at very least a substantial portion thereof." *Land O' Lakes v. Louisiana*, supra, at page 389. (Emphasis supplied)

It is difficult to know how many people have to be affected, but the test seems really to be not the number of people but whether a true quasi-sovereign interest is affected, as opposed to an individual interest.

6. Historically, the foregoing cases are the basis for establishment of the American concept of parens patriae

wherein the state would have capacity to sue as a state (whether in the Supreme Court of the United States or elsewhere) to protect its quasi-sovereign interests, the sort of interests which do not relate to any particular citizen but which generally relate to health, safety and welfare of all the citizens of a state.

These cases have been used as a basis to permit states to bring suits in parens to protect environment, economy, and health and are based upon the duty of the sovereign. Parens in this sense must affect the interests of the public at large, not merely the interests of individuals. Justice Holmes in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) made the distinction between representation by a state of individual property interests and the legitimate interest of a state "in the welfare of the citizens, the interest which it asserts as parens patriae, independent of particular interests of individual citizens, even when it relates to the same subject matter."

In *New Hampshire v. Louisiana, and New York v. Louisiana*, 108 U.S. 76, the Supreme Court denied the plaintiff-states' capacity to sue as assignees of private parties for debts owed by a sister state. In this case, the Court made the distinction that when a citizen can sue for himself (or possibly by analogy in our case defend for himself) there is no necessity for power in his state to sue on his behalf and "we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case." See also *Kansas v. U.S.*, 220 U.S. 277 (1911), where the Court refused to permit a state to appear in parens when the persons directly injured could themselves sue.

One of the basic questions in the within case is whether a judgment against the state will bind the individual property owners. No authority has been found for the proposition that such a judgment against a state could bind the individuals. Wherever the authority of the state to sue (and we assume by analogy to be sued) has been

tested, the Courts have drawn a line between those cases where the state's quasi-sovereign interests were involved, with the state having the authority to sue, and those cases where individual interests and property were concerned and the state was found to have no authority to sue. There is no necessity for allowing states to protect individual interests where adequate safeguards exist in the private party's ability to bring suit himself. Two possible suits on the same claim otherwise might be a possibility.

Malina and Blechman, supra, at page 209, conclude that:

> "the State, as parens patriae, can bring suit only to protect the common welfare of its people as a whole. It cannot sue merely to promote the individual interests of some—*or even all*—of its citizens."

In the instant case, individual citizens have been sued and are presently being served and while they are large in number, mere numbers won't create parens jurisdiction in the state. Each citizen in the within case has his individual rights and can defend them. There is no necessity or duty in the state to defend. A judgment against the state would be fruitless and would not quiet title to the individuals' property rights. There is no showing that any of the defendants are under any disability where the state might be deemed to act in parens under the so-called "Royal Prerogative" theory and if such were deemed to occur as to any defendant, a guardian could be appointed under Nevada State law to represent the interest of such disabled person.

None of the foregoing authorities involve the situation where a state is required in this sense of *protecting* quasi-sovereign interests to be joined in a suit as a defendant. None of these authorities relate to or would permit suit by or against the state for the protection of individual property rights.

7. Water rights in the State of Nevada are of the nature of real property rights. *Carson City v. Estate of Simon M. Lompa*, 88 Nev. 541 (1972). Since the water rights which are the subject of the litigation are individual real property rights, it appears that even if the State desired to represent the individual defendants who own these rights, that it could not, under the common law definition of parens patriae. All of the foregoing authority draw a distinction between the Royal Prerogative which relates to representation of disabled persons and charities and quasi-sovereign interests which are apart for interests of individual citizens, but none of them would assert the common law doctrine of parens patriae that would permit a state to represent individual real property interests or individual interests and rights of any kind, even if *all* of the citizens of the state were involved and, in this case, they are not.

8. In fact, in this case, various citizens of Nevada may have different viewpoints and different interests. The members of the Pyramid Lake Paiute Tribe are citizens of Nevada and occupy a considerable portion of the State. The Citizenship Acts of June 2, 1924, 43 Stat. 253, now 8 USC § 1401, gave all Indians full citizenship, and subjected them to all of its privileges and obligations. By virtue of the Fourteenth Amendment to the Federal Constitution, Indians, as citizens of the United States automatically become citizens of the State of their residence. *Law and The American Indian*, by Monroe E. Price, Contemporary Legal Education Series, Bobbs-Merrill Company (1973) at page 225, and 235-7. The quasi-sovereign sense of parens requires representation of all the citizens of a state, not merely those of a particular race or creed. C.F. NRS 502.280. While Indians may be subject to the application of some laws, different from other citizens, basically they are and remain entitled to the rights of citizens of the state in which they reside. See *American Indians Civil Rights Handbook*, U.S. Commission On Civil Rights, Clearing House Publication No.

33 (March, 1972), at pages 57-58, respecting rights to vote in State and local elections. See also *The States and Their Indian Citizens*, by Theodore W. Taylor, U.S. Dept. of the Indians, Bureau of Indian Affairs (1972) at page 91.

9. The State cannot be required to remain as a defendant, in the broad quasi-sovereign sense of parens, unless it chooses to do so. If the State desired to do so, it could not under the definition of parens represent the individual real property interests, which the defendants have in the waters of the Truckee River, and thereby bind the individual property owners who are named as defendants in this case. This is simply beyond the definition of parens patriae and as Judge Merrill states in *Frito-Lay*, ventures into an uncertain area (which at best has doubtful Constitutional basis) and has no basis in statute or cases.

The case of *California v. U.S.*, 180 Fed. 2d 596 (1950) contains some earlier comments and distinctions from the Ninth Circuit of what parens is and while this earlier case may not be as precise and direct as the Frito-Lay decision in the Ninth Circuit, we think it supports drawing the distinction between the State as parens in the sense of defending the general welfare, as contrasted with representing individual private property interests. The majority decision in *California v. U.S.*, supra, finds that the State may, as a matter of right, be permitted to intervene as a defendant where (see page 601 quoting *Kansas v. Colorado*, 206, U.S. 46, at page 99, supra), "it is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights". Again at page 602, the Court states: "The State of California has as the proper representative of the public welfare, a right to be heard as intervenor between these two proposed private users of its waters, aside from all other considerations."

The Court does not impose any obligation on the State of California to appear in parens, but phrases it as a *right*. The Court does not view this right in a sense that would impose jurisdiction whereby a suit could forcibly be lodged against a state in the quasi-sovereign sense of parens and certainly not in a sense of representing other individual licensees who could be bound by a judgment against the state.

10. The Court in *California v. U.S.*, supra, goes on to delve into the area of whether the State is the owner of the subject water, with the individual users as mere licensees or whether the individuals are the owners, and finds that the State of California is the absolute owner of all water within its boundaries (subject to licenses for use of the same) and therefore permits intervention on this latter point as well. This latter point is strenuously debated by Judge Pope in his dissent. Judge Pope argues that the State of California is really not asserting any ownership right in the water. In Nevada by contrast, individual owners of water rights are (possibly in contravention to the California law) the owners of actual real property rights in such water rights and the State, except in a very broad general and technical sense, is not the owner of water rights. See *Carson City v. Estate of Simon M. Lompa*, supra.

This broad sense of a state owning all the underlying water rights in that state approaches a quasi-sovereign, or even sovereign, parens jurisdiction of a state. Even the majority opinion in *California v. U.S.*, supra, does not assert that the judgment of the State would bind the Sierra Valley Water Company but the Court says at page 599 that the "Water Company can only assert in Court the rights of its shareholders and cannot adequately protect the states' interest in the public welfare . . .". There were many other private users on the Truckee River in California at the time this case was heard, and no one has contended in the Sierra Valley case, or elsewhere,

that the Sierra Valley Decree bound any other private users on the Truckee River except for the Sierra Valley Water Company, because the State of California was permitted to intervene in parens.

This case of *California v. U.S.*, supra, is interesting because both the majority and dissenting opinions treat the United States, in seeking to quiet title on behalf of the Pyramid Lake Paiute Tribe, the Newlands Reclamation Project, etc., as no different than any other private appropriator and entitled to adjudication of waters with relative priority with other users, with the measure of the rights according to fixed measurements, although dependent as to amount on federal common law as defined in *U.S. v. Winters*, infra.

11. Finally, in the prior case in the line of litigation now before the Court, *U.S. v. Nevada and California*, 412 U.S. 534, 93 S. Ct. 2763, 37 L. Ed. 2d 132, (1973), the United States Supreme Court, we feel virtually mandates that the individual water users have their day in Court, as individual defendants, and are not bound by any decree or judgment against the state in a parens capacity as to their individual rights.

The Supreme Court in a per curiam decision in regard to this same subject matter refused original jurisdiction because, among other things, individual users of water in Nevada could not intervene in the Supreme Court. The Supreme Court indicates at page 538 in 412 U.S., that the individual water users should "have an opportunity to participate in their own behalf . . . [as] . . . this litigation goes forward in the District Court." This was an important consideration in rejection of original jurisdiction.

The Supreme Court mentions the parens role of Nevada in representing users in its own state, but only insofar as an interstate allocation, vis a vis California. The Court finds there is no present dispute between the states.

The states have settled the interstate apportionment of the stream by agreement.

12. It seems worthwhile to briefly discuss the nature of a so-called Winters Right, as it may relate to the question of parens. Winters rights were first defined in *Winters v. U.S.*, 207 U.S. 564 (1907). In essence, when an Indian reservation is established in the United States, there are reserved by implication from sources of water at the reservation waters for use on the reservation in an amount "arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which lands had been reserved." *U.S. v. Walker River Irrigation District*, 104 F. 2d 334 (1939) at 336. The case of *Arizona v. California*, 373 U.S. 546 (1963), appears to conclude that there is not too much difference in the application of this theory as between Indian Reservations and other federal reservations and the same rules may apply to each.

Waters and Water Rights, Robert E. Clark, et al, Vol. 2 (1967), at page 388, indicates that "the priority of the Indian water rights (and we presume the same idea may apply to other Federal reservation rights) is the date the reservation was set aside for Indian use, either by treaty, by Act of Congress or by Executive Order." In *Arizona v. California*, supra, at page 600, the Court states:

> "We follow [Winters] now and agree the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created."

It is to be noted in *Arizona v. California* a fixed amount of water right was adjudged to the Indians with a fixed priority, and Justice Black states at page 600:

> "We also agree with the Master's conclusion as to the quantity of water intended to be reserved."

In each Winters Right case, in states which apply the law of prior appropriation, the so-called Winters Rights have been given a quantity assignment and a priority date which is relative to other quantities and priorities of other private and public appropriators from the same source. For example, in *U.S. v. Orr Water Ditch Company*, et al, in the District Court of the United States, In and for the District of Nevada, in Equity Docket No. A3 (which is a typical Winters Rights case and the prior adjudication of the Truckee River) certain rights decreed to the Pyramid Lake Indian Tribe (which is given a priority date of December 8, 1859) and other rights are decreed to the other appropriators with priority dates both prior and subsequent to the Indians' rights.

Arizona v. California, supra, at page 597:

> "The doctrine of equitable apportionment is a method of resolving water disputes between the states. It was created by this Court in the exercise of its original jurisdiction over controversies in which states are parties. An Indian Reservation is not a state and while Congress has sometimes left Indian reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a state that its rights to water should be determined by the doctrine of equitable apportionment."

The Court rejects firmly and finally the proposition that the doctrine of equitable apportionment should be used to divide the water between the Indians and the other people of the State of Arizona.

In other words, Winters water rights established for Indian reservations, or other Federal reservations, are no different than other private appropriation rights on streams within a State, and in this case the rights for the Pyramid Lake Paiute Tribe Reservation have a fixed quantity and date of appropriation, the same as all other

appropriators both public and private on the stream. The State may not be treated in parens as representing a package of the various individual water rights on a stream, as contrasted with the federal rights on the same stream.

13. Since the United States has not attempted to fashion this case as a class action, we have not dealt with that subject. We do feel that there may be some overlap between parens patriae suits and class actions, but do not believe that the State of Nevada can properly be called upon to represent a class of over 12,000 individuals, many of whom have differing interests. It is essential that the parties named as representatives of a class have an interest in the litigation of sufficient magnitude that the rights of each class member will be asserted and fully litigated. The State of Nevada does not have such an interest in this action.

IV CONCLUSION

The State of Nevada simply does not stand in parens patriae in respect to individual water rights of the defendants. It could only stand in parens patriae as far as its own quasi-sovereign interests, which it may or may not, as the course of the litigation goes forward, determine it should assert here. Parens patriae is a common law jurisdiction of limited scope. The limit of the state's authority is its quasi-sovereign interests. If it be determined that the State of Nevada is properly sued in parens patriae, then we feel the judgment of the Court should be that it is in parens only in the broad quasi-sovereign sense apart from the rights of individual citizens and that it is not and cannot be sued as parens in a sense of representing individual property rights. The common law concept of parens which applies here simply doesn't extend to the proposition of a state being entitled or required, whether it wants to or not, to represent and

bind individual property owners, so far as their individual rights are concerned.

Dated: February 26, 1974.

Respectfully submitted,

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Special Deputy Attorney General

[Affidavit of Service by Mail Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987BRT

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT; STATE OF NEVADA; ROLAND D. WESTERGARD, State Engineer of the State of Nevada; and all of the defendants named in the complaint of the United States in Civil No. R-2987BRT,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES CONCERNING APPLICATION OF PARENS PATRIAE

INTRODUCTION

The State of Nevada is a named defendant in this action. It is sued in three capacities: proprietary, governmental, "and as *parens patriae* for its citizens." [1]

This lawsuit is *not* a general stream adjudication. The United States is not seeking to have determined the rights of all of the individual water users along the Truckee River. Rather, the suit seeks a judicial allocation of the waters of the Truckee River as between two sovereigns, the State of Nevada and the United States. How Nevada distributes its allocation, once it is deter-

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[1] Complaint of United States, p. 74.

mined, as between its citizens is not in issue. The individual defendants were joined as parties in order to give them "notice and an opportunity to defend against the additional claims of the United States and the Pyramid Lake Paiute Indians." [2] This distinction between a general stream adjudication and an allocation suit is of critical importance in discussing the application of the parens patriae doctrine to this case. Also, it is irrelevant now whether the individual defendants had to be named as parties or whether the action could have proceeded against the State in their absence. The fact is that all of the Nevada water users of Truckee River water are here.

In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), the Supreme Court reviewed the history and development of the parens patriae concept in English and American law. The Court noted that "the nature of the parens patriae suit has been greatly expanded in the United States beyond that which existed in England." 405 U.S. at 257. Numerous Supreme Court cases "establish the right of a State to sue as parens patriae to prevent or repair harm to its 'quasi-sovereign' interests." 405 U.S. at 258. See also the discussion of parens patriae in the context of a water rights adjudication in *People of the State of California v. United States*, 180 F.2d 596 (9th Cir. 1950), *cert. denied*, 340 U.S. 826.

I

THE FEDERAL DISTRICT COURT HAS JURISDICTION OVER AN ACTION BROUGHT BY THE UNITED STATES AGAINST NEVADA IN ITS PARENS PATRIAE CAPACITY

That the United States can sue a state in its parens patriae capacity in the original jurisdiction of the Supreme Court to effect an allocation of water as between

[2] Complaint of United States, p. 74.

the state and the United States is beyond question. *Arizona v. California*, 373 U.S. 546 (1963); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *United States v. Nevada*, 412 U.S. 534, 37 L.Ed.2d 132 (1973).

28 U.S.C. § 1251(b)(2) provides that the United States Supreme Court shall have original *but not exclusive* jurisdiction of all controversies between the United States and a state. Since the Supreme Court's jurisdiction over suits seeking to allocate waters between the United States and a state is by statute specifically "not exclusive," such suits can be brought in other forums where the courts have both subject matter jurisdiction and jurisdiction over the parties.

Further, 28 U.S.C. § 1345 provides: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

There certainly have not been any Acts of Congress providing that the federal district courts may not exercise jurisdiction over an action brought by the United States against a state in its parens patriae capacity. On the contrary, 28 U.S.C. § 1251(b)(2) strongly indicates that such suits can be brought both in the Supreme Court and in the federal district courts.

Thus, 28 U.S.C. § 1251(b)(2) and 28 U.S.C. § 1345 taken together leave no doubt that the federal district courts have jurisdiction over actions brought by the United States against a state in its parens patriae capacity. In *Hawaii v. Standard Oil Co.*, *supra*, the Supreme Court held that although most parens patriae suits were brought in its original jurisdiction pursuant to Art. III, § 2 of the Constitution, a state could sue in the district court in its parens patriae capacity. 405 U.S.

at 258-259.[3] And in an important Ninth Circuit case, *People of the State of California v. United States*, *supra*, the right of California to intervene in its parens patriae capacity in a water rights adjudication commenced by the United States in district court was upheld. The court stated:

> The State is asserting an interest in the subject matter as the absolute owner of the water and as *parens patriae* on behalf of all its citizens. That is a sufficient interest in the subject matter to entitle it to be heard, just as much as if the State were joined by the United States originally as a defendant. 180 F.2d at 602.

Moreover, the nature of the United States' claims makes it wholly appropriate for Nevada to represent in its parens patriae capacity water users claiming under state law. The United States is not seeking a determination of the amount or priority of any individual water user's state conferred water rights, nor is the United States concerned with the relative priorities to water as between state water users. Rather, the United States is seeking to establish the measure and priority of its water rights as against the water rights over which the state exercises jurisdiction. Therefore, no individual state water user has an interest in the litigation significantly different from that of the state. The interest of the state and the individual water users is identical; to minimize both the extent and priority of the federal and Indian reserved rights. If the United States were seeking by way of a general stream adjudication to define the water rights of the individual state water users, the

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[3] Hawaii's anti-trust claim under the Clayton Act was dismissed not because of parens patriae problems but because the Clayton Act was held not to authorize damages for an injury to the general economy of the state. The Supreme Court had previously held in Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945), that a state could sue in its parens patriae capacity for injunctive relief under the anti-trust laws. See Hawaii v. Standard Oil Co., 405 U.S. at 259-260.

state could not represent all of its users in its parens patriae capacity because there would be an adversity rather than an identity of interest as between the individual state water users.

II

UNDER THE PARENS PATRIAE DOCTRINE, NEVADA REPRESENTS ALL OF ITS WATER USERS WHO ARE NOT INDEPENDENTLY REPRESENTED.

The interest of a state in establishing the quantum of water available for appropriation under its laws has been termed "a matter of sovereign interest" of such magnitude that for this purpose the state "'must be deemed to represent all of its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372-373 (1953), citing *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930). The sovereign interest also entails responsibility vis-a-vis other sovereigns. In *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935), the court held that Wyoming stands in judgment for all of its water users. Recently, in *United States v. Nevada*, the Supreme Court stated: "For the purposes of dividing the waters of an interstate stream with another State, Nevada has the right, parens patriae, to represent all the non-federal users in its own State insofar as the share allocated to the other State is concerned." 37 L.Ed.2d at 136. If the State has this power in connection with negotiating an interstate water compact, there is no reason it should not have the same power in defending a water allocation suit against the United States. *People of the State of California v. United States, supra.*

Consistent with the duties and responsibilities imposed upon a state when it acts in its parens patriae capacity on behalf of its water users, a decree entered against a state will be res judicata as to individual water users within the state and individual water users are not necessary parties to allocation suits as between sover-

eigns. Thus, in *Nebraska v. Wyoming*, *supra* at 43, the Supreme Court rejected Wyoming's contention that the Secretary of the Interior, whose rights to water arose under Wyoming state law, was an indispensable party to the proceeding. The Court concluded: "Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party." Accord: *New Jersey v. New York*, 345 U.S. 369 (1953).

There are sound policies for not regarding individual state water users as necessary parties to inter-sovereign water allocation suits. In *New Jersey v. New York*, *supra* at 373, the Supreme Court stated that the interests of individual appropriators will generally be properly represented by the state; that if the court were to undertake to evaluate all the separate interests within a state, it would be drawn into "an intramural dispute over the distribution of water" within the state which, the Supreme Court implies, would contribute little to resolution of the fundamental and underlying controversy. This rationale applies equally to actions brought by the United States against a state in its parens patriae capacity in the federal district court as well as in the United States Supreme Court. The Supreme Court has also held that a third state through which an interstate stream flows is not an indispensable party to an allocation suit between the two other states. *Nebraska v. Wyoming*, *supra*.

III

THE CASES OF PEOPLE OF THE STATE OF CALIFORNIA V. UNITED STATES, 235 F.2d 647 (9TH CIR. 1956) AND HURLEY V. ABBOTT, 259 F.SUPP. 669 (D. ARIZ. 1966) DO NOT SUPPORT THE PROPOSITION THAT THE UNITED STATES CANNOT SUE A STATE IN A WATER ALLOCATION SUIT IN ITS PARENS PATRIAE CAPACITY.

Both *People of the State of California v. United States*, *supra* (the Fallbrook case) and *Hurley v. Abbott*, 259

F.Supp. 669 (D. Ariz. 1966) involve general stream adjudications in the sense that the suits sought to define the rights of numerous individual water users claiming under both federal and state law as against one another. They were not water allocation suits defining the relative rights of two or more sovereigns.

In the Fallbrook case, the United States had acquired all of its rights to water pursuant to California law. In suing to quiet title to the water rights appurtenant to its land, the United States did not sue the state parens patriae but rather joined some 3,000 defendants claiming as either appropriators or riparians under state law. From among these 3,000 defendants, a single one was selected for purposes of holding a separate trial. After this separate trial limited to the one defendant and the state, the lower court issued a partial judgment affixing the rights of the United States as against the single defendant, the State of California, and all of the other 3,000 litigants.

In reversing the lower court's holding, the Ninth Circuit Court of Appeals found numerous errors in the district court's application of state law. To summarize briefly, the court held that if it is to determine questions such as whether "surplus water" exists on a stream, or the extent of the rights of some 3,000 individual water users, those water users must be afforded a right to be heard. Moreover, since the rights of the United States at issue in the Fallbrook case were not federally reserved rights but were rather riparian and therefore *correlative* rights defined by state law, the rights of the United States could only be defined and quantified as against the other California holders of riparian and/or appropriative rights. That is, the measure of the right of a California riparian depends not only upon his actual and potential water uses but the actual and potential uses of the other riparian owners along the stream and the amount of water available in the stream. By contrast, federally

reserved rights are what might be termed absolute rather than correlative. Their measure and priority can be and are defined without reference to the rights of other users under state law. *Arizona v. California, supra.*

In *Hurley v. Abbott*, the district court granted the motion of the United States as intervenor to dismiss the petition of an Arizona water users' association to enlarge a 1910 decree on the grounds that in order to do so all the appropriators that were parties to the original decree would have to be joined. Just as the Fallbrook case failed to reach questions regarding the power of the United States to sue a state parens patriae in an allocation suit in federal district court, or the scope of the state's duty to represent its water users in its parens patriae capacity, so too in *Hurley v. Abbott* the court's concern is manifestly far removed from the sovereign power of the United States to sue a state in its parens patriae capacity or the consequences of that power. The court's opinion recognizes that the nature of the suit, the kind of adjudication that is sought, determines who are the necessary, appropriate or indispensable parties. 259 F.Supp. at 670.

The Fallbrook case and *Hurley v. Abbott* stand for the proposition that when the United States or anyone else brings a general stream adjudication to define the rights of all of the users as against one another, all of those users must be joined. Neither of those cases, nor to the best of our knowledge any other case, holds or intimates that all the individual water users are necessary, proper or indispensable parties in a suit seeking to allocate the waters of a given stream between two or more sovereigns. Still less do they contain any implication that the state cannot represent in its parens patriae capacity named defendants claiming under state law who elect not to retain their own counsel.

CONCLUSION

It must be emphasized that there is absolutely no element of compulsion involved in the application of parens patriae to this case. The defendants who elect to be represented by their own counsel are perfectly free to do so. But those defendants who believe that their interests are and can be adequately represented by the State of Nevada acting in its parens patriae capacity are entitled to rely on the state to provide that service. No extra burdens are placed upon the state since it would inevitably take the lead in the litigation in any event. From a practical standpoint, in a suit of this complexity with 13,000 defendants, for many defendants retaining an attorney would cost more than their water rights are worth. There is no basis for the State of Nevada to escape or retreat from its obligation to represent those of its citizens who choose not to file an answer or file an appearance. The court should therefore enter an order to that effect.

Respectfully submitted,

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Dated: March 1, 1974

[Certificate of Service Omitted in Printing]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

ANSWER AND CROSS CLAIM OF TRUCKEE-CARSON IRRIGATION DISTRICT

Comes now the defendant, Truckee-Carson Irrigation District, and answers the complaint of the United States as follows:

I

Answering the allegations of Paragraph I of the complaint, defendant admits that this is an action commenced by the United States on its own behalf and in its fiduciary capacity on behalf of the Pyramid Lake Paiute Tribe of Indians.

II

Answering the allegations of Paragraph II of the complaint, defendant admits that a substantial number of the named defendants, are the present owners or claimants of rights to the use of the waters of the Truckee River that were specified, determined and allowed in the Final Decree entered in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada. A copy of said Final Decree (including a copy of the July 1, 1935 Truckee River Agreement which was approved and adopted by the court and made a part of that Final Decree) is attached hereto, marked Exhibit "A" and made a part hereof. Defendant alleges that all rights of the United States and of the Pyramid Lake Paiute Tribe of Indians to the use of the waters of the Truckee River were litigated in that case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3 in the District Court of the United States in and for the District of Nevada. Defendant further alleges that the Final Decree in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada is res judicata, and that the United States, on its own behalf and in its fiduciary capacity on behalf of the Pyramid Lake Paiute Tribe of Indians is barred and/or estopped from litigating and/or claiming in this case the rights to the use of the waters of the Truckee River as alleged in the complaint for said alleged rights were not specified, determined and allowed

in the Final Decree entered in said case. Except as expressly admitted or alleged hereinabove, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph II of the complaint.

III

Answering the allegations of Paragraph III of the complaint, defendant admits that the Truckee River System or watershed includes Lake Tahoe and its tributaries, and that the Truckee River commences at the outlet of Lake Tahoe in California and that it flows for approximately 20 miles through the State of California into the State of Nevada, where it then flows for approximately 65 miles, passing through the cities of Reno and Sparks and terminating at Pyramid Lake which has no outlet. Defendant also alleges that downstream from the outlet of Lake Tahoe (and primarily in California) there are several streams which are tributary to the Truckee River and contribute substantially to its flow.

IV

Answering the allegations of Paragraph IV of the complaint, defendant admits that Lake Tahoe is located in the Sierra Nevada Mountains and that in a state of nature its maximum water surface elevation was approximately 6,223 feet above sea level, and that portions of the boundary line between the States of California and Nevada runs through Lake Tahoe and that Lake Tahoe receives drainage from the mountains surrounding it in both States. Defendant also admits that at the outlet of Lake Tahoe, in the State of California is a dam, and that this dam and the damsite were acquired by the United States by condemnation proceedings in the case entitled *United States of America* vs. *Truckee River General Electric Company*, Civil No. 14861, in the United States District Court in and for the Northern District of California. Defendant admits that this dam provides approximately six feet of additional storage space in

Lake Tahoe, and that Lake Tahoe has a maximum storage capacity of approximately 732,000 acre-feet of water between elevations 6,223 and 6,229 feet above sea level. Defendant alleges that the amount of water which in fact is physically available for storage in Lake Tahoe between said elevations is dependent upon the inflow into Lake Tahoe from its watershed, which in turn is dependent to a major degree on the amount of rainfall, and snowpack which is variable.

V

Answering the allegations of Paragraph V of the complaint, defendant admits that Pyramid Lake is the natural terminus of the Truckee River and that Pyramid Lake has no outlet and that it is situated in the State of Nevada approximately 30 miles north of Reno. Defendant admits that the sole sources of water to Pyramid Lake and those waters resulting from direct precipitation on said lake, and the flow from tributaries which are within the Pyramid Lake watershed which do not become a part of the flow of the Truckee River. Defendant denies that the average annual flow of the Truckee River into Pyramid Lake in recent years has been approximately 250,000 acre-feet. Defendant alleges that historically, the water surface elevation of Pyramid Lake has fluctuated greatly due largely to variations in precipitation in the watershed, but except for such variations, it has been declining since the lake was formed. Defendant admits that following 1906 the lake surface elevation declined but defendant alleges that in recent years there has been some raising of the lake surface elevation of Pyramid Lake, the extent of which is not presently known to defendant. Defendant denies that the extinction of the species of trout in Pyramid Lake is threatened and defendant alleges that those trout are thriving. Defendant denies that the continued existence of Pyramid Lake as a useful body of water is threatened. Defendant alleges that at the present time, Pyramid Lake

has a surface size of approximately 110,000 acres (or 172 square miles) and that approximately 440,000 acre-feet of water per year is irretrievably lost by evaporation from Pyramid Lake. Defendant alleges that a use of Truckee River water in Nevada to balance the annual evaporative loss of 440,000 acre-feet of water per year from Pyramid Lake would not be a reasonable and beneficial use of water, but a waste of water in a water short area, and not necessary to the use of Pyramid Lake for any reasonable and beneficial purpose. Except as expressly admitted, denied or alleged hereinabove, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph V of the complaint.

VI

Answering the allegations of Paragraph VI of the complaint defendant alleges that in recent years and at the present time, the approximate 400 members of the Pyramid Lake Paiute Tribe of Indians who reside within the Pyramid Lake Indian Reservation have charged fees to non-members of the Tribe to fish in the lake but defendant has no knowledge as to the number of such fishermen or the amount of income derived by the Indians from such fees. Defendant alleges that the members of the Tribe who have lived and now live within the Reservation may have used the waters of the Truckee River for their domestic needs. Defendant alleges that the use of the waters of the Truckee River by members of the Pyramid Lake Paiute Tribe of Indians who reside within the Reservation for irrigation has been either nonexistent or minimal. Except as expressly admitted or alleged hereinabove defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VI of the complaint.

VII

Answering the allegations of Paragraph VII of the complaint defendant admits that Pyramid Lake Indian

Reservation was established on March 23, 1874 pursuant to an executive order signed by President Grant and that the Reservation was reserved for members of the Pyramid Lake Paiute Tribe. Except as expressly admitted hereinabove defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VII of the complaint.

VIII

Answering the allegations of Paragraph VIII of the complaint defendant denies those allegations. Defendant further alleges that the Pyramid Lake Paiute Tribe of Indians' right to the use of the waters of the Truckee River and its tributaries has been litigated in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada, and that the Final Decree in said case is res judicata and that the United States on behalf of the Pyramid Lake Paiute Tribe of Indians is barred and/or estopped from claiming any right to the use of the waters of the Truckee River except for those rights specified, determined and allowed in said Final Decree.

IX

Answering the allegations of Paragraph IX of the complaint defendant admits that the Newlands Irrigation Project works are operated by defendant as provided by the provisions of a December 18, 1926 written contract between the United States and the Truckee-Carson Irrigation District. A copy of said December 18, 1926 contract between the United States and the Truckee-Carson Irrigation District is attached hereto marked Exhibit "B" and made a part hereof. Defendant alleges that releases from Lake Tahoe and the diversion of water from the Truckee River to the project's Truckee Canal are subject to the provisions of the Final Decree (includ-

ing the provisions of the July 1, 1935 Truckee River Agreement) entered in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada, including those provisions in said Final Decree concerned with the jurisdiction and responsibilities of the court appointed Water Master. Defendant admits that on September 14, 1973, the Secretary of the Department of Interior mailed a notice to the Truckee-Carson Irrigation District which stated that the December 18, 1926 contract between the United States and the Truckee-Carson Irrigation District was to be terminated on October 31, 1974 for alleged violations of the terms of that contract; defendant alleges that it has at no time violated the terms of that contract, and that said notice was arbitrary, unreasonable, contrary to law and void and of no effect whatsoever.

X

Answering the allegations of Paragraph X of the complaint defendant admits those allegations. A copy of the Tripartite Agreement dated November 26, 1948, is attached hereto, marked Exhibit "C", and made a part hereof.

XI

Answering the allegations of Paragraph XI of the complaint defendant alleges that the rights of the United States to the use of water on Stillwater Wildlife Refuge is a contractual right and the extent of that right must be ascertained from the terms of the Tripartite Agreement, a copy of which is attached hereto as Exhibit "C", and made a part hereof. Defendant alleges that if the claims of the United States on behalf of the Pyramid Lake Paiute Tribe of Indians, as alleged in the complaint, were upheld there would be little, if any, drainage and return flows from the Newlands Project, and Stillwater Wildlife Refuge would be destroyed.

XII

Answering the allegations of Paragraph XII of the complaint defendant admits those allegations and further alleges that the capacity of Stampede Reservoir is approximately 226,000 acre-feet, and that the Washoe Project also includes Prosser Reservoir, which has been constructed and is situated on a tributary of the Truckee River in California, and that Prosser Reservoir has a capacity of 30,000 acre-feet. Defendant alleges that these reservoirs, have in fact provided water for streamflow maintenance for fishery purposes and will, in conjunction with other project works, provide an adequate flow in the Truckee River to assure that the fish in Pyramid Lake will be able to migrate and spawn and continue to thrive, notwithstanding the continuance of the existing uses of the waters of the Truckee River upstream from Pyramid Lake.

XIII

Answering the allegations of Paragraph XIII of the complaint defendant alleges that the Newlands Project is an authorized federal reclamation project and if in fact and law the Pyramid Lake Paiute Tribe of Indians had a right to the use of the waters of the Truckee River for the purposes as alleged in said Paragraph XIII of the complaint (which is denied by defendant), the authorization and construction of said Newlands Project and the diversion of the waters of the Truckee River into the project's Truckee Canal and other project facilities and then to the lands within said project for irrigation and other beneficial uses (for some seventy plus years), constituted a taking of that right of the Pyramid Lake Paiute Tribe of Indians to the use of said water, for which the sole remedy of the Pyramid Lake Paiute Tribe of Indians was the payment of compensation by the United States as required by the United States Constitution. Except as expressly alleged hereinabove, defendant denies the contentions as alleged in Paragraph XIII of the complaint.

XIV

Answering the allegations of Paragraph XIV of the complaint defendant admits that the United States owns lands within the watershed of the Truckee River in the State of Nevada which are part of the Toiyabe National Forest. Except as expressly admitted hereinabove defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph XIV of the complaint.

XV

Answering the allegations of Paragraph XV of the complaint, defendant denies that the United States has the right to the use of the waters of the Truckee River and its tributaries which is claimed by the United States in said paragraph. Defendant alleges that all rights of the United States to the use of the waters of the Truckee River and its tributaries in the State of Nevada have been heretofore litigated in the case entitled *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada, and that all rights of the United States to the use of said waters were specified, determined and allowed in the Final Decree dated September 8, 1944, entered in said case, and that said Final Decree is res judicata and that the United States is barred and/or estopped from litigating or claiming in this case any right to the use of said waters on national forest lands for such right was not specified, determined and allowed in said Final Decree entered in said case.

XVI

Answering the allegations of Paragraph XVI of the complaint, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph XVI of the complaint. Defendant further alleges that all rights of the United States to the use of the waters of the Truckee River and its tributaries in

the State of Nevada have been heretofore litigated in the case entitled *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3 in the District Court of the United States in and for the District of Nevada, and that all rights of the United States to the use of said waters was specified, determined and allowed in the Final Decree dated September 8, 1944, entered in said case, and that said Final Decree is res judicata and that the United States is barred and/or estopped from litigating or claiming in this case any right to the use of said waters for the purposes as alleged in Paragraph XVI of the complaint, for such right was not specified, determined and allowed in said Final Decree entered in said case.

XVII

Answering the allegations of Paragraph XVII of the complaint, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph XVII of the complaint. Defendant further alleges that all rights of the United States to the use of the waters of the Truckee River and its tributaries in the State of Nevada have been heretofore litigated in the case entitled *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada, and that all rights of the United States to the use of said waters was specified, determined and allowed in the Final Decree dated September 8, 1944, entered in said case, and that said Final Decree is res judicata and that the United States is barred and/or estopped from litigating or claiming in this case any right to the use of said waters for the purposes as alleged in Paragraph XVII of the complaint, for such right was not specified, determined and allowed in said Final Decree entered in said case.

XVIII

Answering the allegations of Paragraph XVIII of the complaint defendant admits that on or about February 3,

1913, the action entitled *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3 was commenced in the United States District Court in and for the District of Nevada, and defendant alleges that all right of the United States, on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians, and of the defendants, to the use of the waters of the Truckee River and its tributaries in the State of Nevada were specified, determined and allowed in the Final Decree entered in said case on September 8, 1944. Except as expressly admitted and alleged hereinabove, defendant denies the allegations of Paragraph XVIII of the complaint.

XIX

Answering the allegations of Paragraph XIX of the complaint defendant admits that the Final Decree in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3 in the District Court of the United States in and for the District of Nevada was entered on September 8, 1944, and defendant alleges the rights to the use of waters of the Truckee River and its tributaries as specified, determined and allowed in said Final Decree, can best be ascertained from said Final Decree, a copy of which is attached hereto as Exhibit "A" and made a part hereof. Except as expressly admitted or alleged hereinabove, defendant denies the allegations of Paragraph XIX of the complaint.

XX

Answering the allegations of Paragraph XX of the complaint defendant denies those allegations, and defendant further alleges that the rights and obligations of the United States concerned with the use of the waters of the Truckee River and its tributaries within the Newlands Project can be determined from the provisions of the December 18, 1926, written contract between the United States and the Truckee-Carson Irrigation Dis-

trict, and the provisions of the Final Decree (including the July 1, 1935 Truckee River Agreement which was approved and adopted by the court and made a part of that Final Decree), entered on September 8, 1944, in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada.

XXI

Answering the allegations of Paragraph XXI of the complaint defendant denies those allegations. Defendant alleges that the use of water on Newlands Project lands has been reasonable and beneficial and not excessive. Defendant further alleges that if the claims of the United States in its fiduciary capacity on behalf of the Pyramid Lake Indians as alleged in its complaint were upheld, it would result in no water from the Truckee River being available for any use in Nevada upstream from Pyramid Lake in approximately fifty percent of the years, and, from data obtained from past streamflow measurements, for periods of at least ten consecutive years, and that this would consequently result in the destruction of the existing economy of western Nevada, including the obliteration of the water supply presently used to support the livelihood of approximately 250,000 people.

XXII

Answering the allegations of Paragraph XXII of the complaint defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

AFFIRMATIVE DEFENSES

I

As a separate affirmative defense to the allegations of the complaint, defendant alleges that all rights of the United States and the Pyramid Lake Paiute Tribe of

Indians to the use of the waters of the Truckee River and its tributaries have been heretofore litigated in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the District Court of the United States in and for the District of Nevada, and that all rights of the United States and the Pyramid Lake Paiute Tribe of Indians to the use of said waters were specified, determined and allowed in the Final Decree dated September 8, 1944, entered in said case; that said Final Decree (at page 87), enjoined and restrained forever the United States on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries except the rights specified, determined and allowed in that Final Decree, and that said Final Decree is res judicata and that the United States on its own behalf and on behalf of the Pyramid Lake Tribe of Indians is barred and/or estopped from litigating or claiming in this case the rights to the use of said waters as alleged in its complaint for said alleged rights were not specified, determined and allowed in said Final Decree entered in said case.

II

As a separate affirmative defense to the allegations of the complaint, defendants allege that the action entitled *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the United States District Court in and for the District of Nevada, was an action commenced by the United States to obtain an adjudication of the rights of the users in the State of Nevada to the waters of the Truckee River and its tributaries, including the rights of the United States on its own behalf to the use of said waters and on behalf of the Pyramid Lake Paiute Tribe of Indians to the use of said waters. That if the United States did not assert in that action any rights to the use of said waters for the purposes as alleged and claimed in the instant complaint,

it could and should have done so, for the law requires that all such claims of right be asserted and adjudicated in that one action, and by failing to do so the United States on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians is now barred by the doctrine of res judicata from asserting in the instant case said alleged claims of right to the use of said waters. Defendant alleges that in a suit to adjudicate the users' rights to the waters subject to the court's jurisdiction each user must assert all their respective claims of right to the use of those waters and those rights not asserted and adjudicated are barred from being asserted and being litigated in a separate and subsequently filed suit. Therefore, defendant alleges that the Final Decree dated September 8, 1944, and entered in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the United States District Court in and for the District of Nevada is res judicata and that the United States on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians is barred and/or estopped from litigating or claiming in this case the rights to the use of said waters as alleged in its complaint for said alleged rights were not specified, determined or allowed in said Final Decree entered in said case, and all parties in said case, including the United States on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians were forever restrained and enjoined by said Final Decree (at page 87), from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries except the rights specified, determined and allowed in that Final Decree.

III

As a separate affirmative defense to the allegations of the complaint concerned with the claims of right to the use of the waters of the Truckee River and its tributaries asserted by the United States on behalf of the Pyramid Lake Paiute Tribe of Indians, defendant alleges

that the Newlands Project was an authorized federal project and if in fact and law the Pyramid Lake Paiute Tribe of Indians had a right to the use of the waters of the Truckee River and its tributaries for the purposes as alleged in the complaint, the federal authorization and construction of said project and the federal diversion of the waters of the Truckee River into the project's Truckee Canal and other project facilities, and then to the lands within said project for irrigation and other beneficial uses (which in fact has occurred for some seventy plus years), constituted a taking by the United States of that right of the Pyramid Lake Paiute Tribe of Indians to the use of said water for said purposes, for which the sole remedy of the Pyramid Lake Paiute Tribe of Indians was the payment of compensation by the United States as required by the United States Constitution.

IV

As a separate affirmative defense to the allegations of the complaint concerned with the claims of right to the use of the waters of the Truckee River asserted by the United States on behalf of the Pyramid Lake Paiute Tribe of Indians, defendant alleges that such uses would not be a reasonable and beneficial use of water but in fact wasteful, and not required for any reasonable and beneficial use of Pyramid Lake, including fishery uses. Defendant alleges that the evaporative loss of water from Pyramid Lake each year is approximately 440,000 acre-feet. That if it were to be determined that the Pyramid Lake Paiute Tribe of Indians were entitled to receive each year with a priority of November 29, 1859, sufficient water from the Truckee River to offset the annual evaporative loss of 440,000 acre-feet from Pyramid Lake, there would be no water available for any upstream use in Nevada in approximately fifty percent of the years. On information and belief which is based on past stream-flow measurements, defendant alleges there would be periods of at least ten consecutive years where the total

flow of the Truckee River in Nevada during that consecutive 10-year period would be less than the amount required to offset the total evaporative loss from Pyramid Lake which would occur during that consecutive 10-year period. Defendant alleges that if the United States' claims of right on behalf of the Pyramid Lake Paiute Tribe of Indians to the use of the waters of the Truckee River were recognized, the economy of western Nevada would be destroyed, and the water supply of approximately 250,000 people obliterated; defendant alleges that western Nevada is a water short area, and a use of approximately 385,000 to 400,000 acre-feet of water annually from the Truckee River to offset the evaporative loss of a lake which has no outlet and is situated at the terminus of the river, is not a reasonable and beneficial use of water but a waste of water.

V

As a separate affirmative defense to the complaint defendant alleges that there are a substantial number of owners of rights to the use of the waters of the Truckee River and its tributaries in the State of Nevada who are subject to service of process and whose use of those waters is in the State of Nevada, and thus subject to the subject matter jurisdiction of this court, and these owners of those rights have not been named as defendants in this case. Defendant alleges that if these owners of those rights to the use of said waters are not made defendants in this case, there cannot be a complete resolvement of the issues and complete relief accorded to those already named as defendants for in the absence of the joinder as defendants of those persons they would not be bound by the determination of the court in this proceeding, and they could ignore any such determination if it was in their interest to do so, which would then leave those persons who are named as defendants as the only persons who would be subject to and bound by the determinations of the court in this proceeding, or in the alternative there

would have to be another suit commenced against those persons and those persons could relitigate the same issues as will be litigated in this proceeding, and quite possibly this could result in conflicting judicial determinations. Defendant does not know the names of all such persons or entities who have rights to the waters of the Truckee River and its tributaries for use in the State of Nevada who have not been named as defendants in this proceeding but they would include all users of the waters of Lake Tahoe and its tributaries in the Lake Tahoe watershed in the State of Nevada, and all persons within the Truckee and Carson Divisions of the Newlands Project who presently own water rights which have been heretofore transferred and assigned to them (or their predecessors), by the United States. Defendant does not know the reason why the United States did not join those persons as defendants in this action. Defendant alleges that pursuant to Rule 19 of the Federal Rules of Civil Procedure the United States should be ordered to join those persons as defendants in this proceeding.

CROSS CLAIM

I

This cross claim is by Truckee-Carson Irrigation District, an irrigation district duly organized and existing under the laws of the State of Nevada, with its principal place of business at Fallon, Nevada, and it is against all presently named defendants in this case, and any persons or entities hereinafter named as a defendant in this case.

II

Truckee-Carson Irrigation District alleges that pursuant to the terms of the December 18, 1926 written contract between it and the United States (Exhibit "B"), and the provisions of the Final Decree (including the July 1, 1935 Truckee River Agreement), entered in the case of *United States of America* vs. *Orr Water Ditch*

Company, et al., Equity No. A-3, United States District Court in and for the District of Nevada (Exhibit "A"), Truckee-Carson Irrigation District has the right to divert into the Truckee Canal waters of the Truckee River to be used for the irrigation of 87,500 acres of land within the Newlands Project, and for the other project purposes as provided in said December 18, 1926 written contract and said Final Decree.

III

The priority of said right as specified, determined and allowed in said Final Decree is July 2, 1902.

IV

There are a substantial number of existing rights to the use of the waters of the Truckee River and its tributaries in the State of Nevada which have a priority date subsequent to July 2, 1902.

V

If the claims of right to the use of the waters of the Truckee River and its tributaries by the United States on behalf of the Pyramid Lake Paiute Tribe of Indians as alleged in the complaint of the United States were determined to be valid, there would not be in many years sufficient water available to satisfy all the valid existing rights to the use of the waters of the Truckee River and its tributaries in the State of Nevada.

VI

If the claims of right to the use of the waters of the Truckee River and its tributaries as asserted in the complaint of the United States on behalf of the Pyramid Lake Paiute Tribe of Indians were determined to be valid, it would in fact give to the Pyramid Lake Paiute Tribe of Indians the first priority to receive on the Pyra-

mid Lake Indian Reservation approximately 85 percent of the average total flow of the Truckee River and its tributaries in the State of Nevada, and for all practical purposes, the rights of the parties as set forth in the September 8, 1944 Final Decree (including the July 1, 1935 Truckee River Agreement which was approved by the court and made a part of that Final Decree) in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3 in the United States District Court in and for the District of Nevada (Exhibit "A"), would be abrogated.

VII

In the event that the claims of right to the use of the waters of the Truckee River and its tributaries by the United States on behalf of the Pyramid Lake Paiute Tribe of Indians as alleged in the complaint of the United States are determined by this court to be valid, it will be necessary in order to provide full and complete relief to all parties, for this court to determine each existing right to the use of the waters of the Truckee River and its tributaries in the State of Nevada, and to enter an appropriate decree. In the event of a determination by this court that said claims of the United States on behalf of the Pyramid Lake Paiute Tribe of Indians are valid, a request for such a determination and decree is made.

WHEREFORE, Truckee-Carson Irrigation District Prays as Follows:

AS TO THE COMPLAINT OF THE UNITED STATES

1. That no decree quieting title to the use of the waters of the Truckee River and its tributaries on behalf of the United States itself or on behalf of the United States for the benefit of the Pyramid Lake Paiute Tribe of Indians be granted, but to the contrary that the judgment or decree provide that the United States on its own behalf and on behalf of the Pyramid Lake Paiute Tribe

of Indians has no right to the use of the waters of the Truckee River and its tributaries for the purposes as alleged in its complaint, and that the United States on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians be perpetually enjoined and restrained from claiming or asserting in any manner whatsoever, directly or indirectly, any right to the use of the waters of the Truckee River and its tributaries in the State of Nevada, except for those rights which were specified, determined and allowed in the Final Decree entered on September 8, 1944, in the case of *United States of America* vs. *Orr Water Ditch Company, et al.*, Equity No. A-3, in the United States District Court in and for the District of Nevada.

2. That defendant have and recover its costs of suit herein.

3. For such other and further relief as to this court seems proper in the premises.

AS TO THE CROSS CLAIM

1. That in the event this court were to determine that a decree is to be entered quieting title in the United States for the benefit of the Pyramid Lake Paiute Tribe of Indians to use the waters of the Truckee River and its tributaries for the purposes as alleged in the complaint, this court then determine all existing rights to the use of the waters of the Truckee River and its tributaries in the State of Nevada and then enter an appropriate decree which would quiet title in the owners of each right determined, and contain provisions which would assure that all uses of those waters be consistent with the right determined and the law.

2. That the defendant have and recover its cost of suit herein.

3. For such other and further relief as to this court seems proper in the premises.

Dated: March 18, 1974.

/s/ E. J. Skeen
E. J. SKEEN

/s/ James W. Johnson, Jr.
JAMES W. JOHNSON, JR.

/s/ Frederick G. Girard
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987BRT

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT; STATE OF NEVADA; ROLAND D. WESTERGARD, State Engineer of the State of Nevada; and all of the defendants named in the complaint of the United States in Civil No. R-2987BRT,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO THE POSITION OF THE STATE OF NEVADA CONCERNING PARENS PATRIAE

Nevada contends that it cannot be required to appear in this case as a defendant in its parens patriae capacity

"unless it chooses to do so."[1] Nevada does not cite a single case, or other authority, and the Tribe knows of none, in which any state has been granted such an option when sued by another sovereign, either another state or the United States.

Nevada stresses over and over that a state may elect to sue in its parens patriae capacity, implying that there is some distinction between suing and being sued.[2] Nevada completely overlooks the fact that in many of the water allocation cases in which a state has sued in its parens patriae capacity, the defendant has been another state which has been sued, and required to defend in, its parens patriae capacity. *E.g.*, *Arizona v. California*, 373 U.S. 546 (1963); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Nebraska v. Wyoming*, 295 U.S. 40 (1935); *New Jersey v. New York*, 283 U.S. 336 (1931) and 345 U.S. 369 (1953); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

This case is identical to *Arizona v. California*, *supra*, other than that this case is brought now in district court, not in the original jurisdiction of the Supreme Court, and that the United States here is a plaintiff rather than an intervenor. These differences are immaterial. The United States intervened in *Arizona v. California* and asserted, *inter alia*, claims on behalf of five Indian reservations against the states (including Nevada, 373 U.S. at 550) and other parties to the litigation. 373 U.S. at 595-601. The states appearing in their parens patriae capacities (see, *e.g.*, 373 U.S. at 551) had no choice other than to defend against these claims on behalf of their water users. Neither does Nevada.[3]

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[1] Nevada's Memorandum, pp. 1-2, 8, 14.

[2] Nevada's Memorandum, pp. 9, 10, 14-15.

[3] No claim was even made, nor to the best of our knowledge has any claim ever been made, that the Supreme Court's decree allocating Colorado River water to the five Indian reservations in Arizona

Respectfully submitted,

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Paiute Tribe of Indians

Dated: March 13, 1974

[Certificate of Service Omitted in Printing]

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v. California, 376 U.S. 340 (1964) is not binding upon all of the water users and property owners in the states that appeared in the action.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al*,
Defendants.

ANSWER TO PLAINTIFF'S COMPLAINT

COMES NOW, the State of Nevada, in behalf of itself and all of its departments, divisions, agencies, institutions, boards and commissions who are sued herein as parties defendant, and for answer to the plaintiff's Complaint in this cause alleges, avers and pleads as follows:

I

This defendant admits the allegations of Paragraph I of the Complaint.

II

In answer to the allegations of Paragraph II of the Complaint, this defendant alleges as follows:

(a) This defendant admits the allegations of the first sentence of said Paragraph.

(b) This defendant denies the allegations of the second sentence of said Paragraph.

(c) This defendant denies the allegations contained in the third sentence of said Paragraph because the United States, in its Complaint, obviously does dispute the rights which were decreed in the Final Decree, entered September 8, 1944, in the case of *United States of America vs. The Orr Water Ditch Company, et al*, In Equity No. A3, In the United States District Court for the District of Nevada, sometimes hereinafter referred to as the "Orr Ditch Final Decree". The Orr Ditch Final Decree settled, adjudicated, adjudged and finally decreed all rights to the Truckee River, and its tributaries, as between the United States on its own behalf and in its fiduciary capacity on behalf of the Pyramid Lake Paiute Tribe of Indians, sometimes hereinafter referred to as the "Tribe", and the defendants named therein, a majority of whom are either named as defendants in this action, or are the predecessors of defendants named in this action.

The imposition in the instant case of an 1859 priority on Truckee River water to maintain Pyramid Lake would create a priority ahead of and senior to all but two or three of the hundreds of rights decreed in the Orr Ditch Final Decree, and if enforced, will result in making nearly all of the rights adjudicated in the Orr Ditch Final Decree junior to the rights claimed by the United States in the present action. Enforcement of a decree to maintain Pyramid Lake, as proposed in plaintiff's Complaint, will render almost all rights decreed in the Orr Ditch Final Decree subordinate and junior thereto, and meaningless or nullified, as proposed in plaintiff's Complaint. A senior priority changes the nature of the existing rights because the senior priority must first be entirely satisfied before the junior rights are entitled to be satisfied.

The Orr Ditch Final Decree specifies and determines all rights held by the parties thereto in or to the waters of the Truckee River or its tributaries and perpetually restrains and enjoins the United States in its own behalf and as fiduciary in behalf of the Tribe from claiming any additional or other rights, or rights for any other purposes except as specified therein, and hence bars the claims made herein by plaintiff.

(d) This defendant admits the allegations of the fourth sentence of said paragraph.

(e) This defendant admits the allegations of the fifth sentence of said paragraph, except that defendant denies that the United States, in its own behalf or in its fiduciary capacity on behalf of the Tribe, is entitled to any additional rights on the Truckee River or its tributaries.

(f) This defendant admits the allegations of the sixth sentence of said Paragraph, except that this defendant alleges that in order for the United States to obtain the relief it seeks in its Complaint, it was necessary and required that these defendants be named as parties to this action because each of said defendants in this action owns valid water rights in the Truckee River and its tributaries.

(g) This defendant is without knowledge or sufficient information to form a belief as to the truth of the allegations contained in the seventh sentence of said Paragraph and, therefore, denies, all and singular, the same. The Complaint does not designate what "other defendants" plaintiff is referring to in making this allegation.

(h) In regard to the allegations of the eighth sentence of said Paragraph, this defendant admits that it is the owner of certain water rights as a proprietor on the Truckee River, but denies that it is properly named as a party defendant in that capacity, in that this defendant takes the position that the plaintiff has no valid claim against this defendant in its proprietary capacity. De-

fendant denies, all and singular, the other allegations contained in said sentence because the State of Nevada may not be sued in its governmental capacity as an issuer of permits to appropriate unappropriated waters or as parens patriae for its citizens.

III

In answer to the allegations of Paragraph III of the Complaint, this defendant admits that the Truckee River system originates in California in the Sierra Nevada Mountains. This defendant further admits that the stream system includes Lake Tahoe, and that after leaving Lake Tahoe, the Truckee River flows for approximately 20 miles in the State of California and then crosses into the State of Nevada, where it flows approximately 65 miles, passing through the Cities of Reno and Sparks, and empties into Pyramid Lake. Defendant denies, all and singular, the other allegations of said Paragraph.

IV

This defendant admits the allegations of Paragraph IV of the Complaint, except that this defendant denies that the storage capacity of Lake Tahoe as a storage reservoir is 750,000 acre feet and alleges that such storage capacity has a maximum of 732,000 acre feet.

V

In answer to the allegations of Paragraph V of the Complaint, this defendant alleges as follows:

(a) This defendant admits the allegations of the first sentence of said Paragraph.

(b) In regard to the allegations of the second sentence of said Paragraph, this defendant admits that Pyramid Lake is a beautiful lake in a colorful and picturesque setting. For lack of sufficient information and knowledge at this time to form a belief as to the remainder of the

allegations contained in said sentence, this defendant denies, all and singular, the same.

(c) This defendant admits the allegations of the third sentence of said Paragraph.

(d) In regard to the allegations of the fourth and fifth sentences of said Paragraph, this defendant denies, all and singular, the same because the allegations set forth only an approximation of the elevation, length and depth of the lake, apparently at the time the Complaint was filed, rather than an exact elevation, length and depth. Since the exact elevation, length and depth of the lake may become of prime importance in this litigation, this defendant, therefore, enters its denial accordingly.

(e) In regard to the allegations of the sixth sentence of said Paragraph, this defendant alleges that the sole natural source of water for the lake is the Truckee River, except for direct precipitation into the lake, which is substantial, and for drainage of waters into the lake and some tributaries thereto other than the Truckee River. This defendant denies, all and singular, all the other allegations of said sentence.

(f) In regard to the allegations of the seventh sentence of said Paragraph, defendant alleges that there is evaporated from the surface of the lake, four acre feet per acre, more or less, each year, and that the total amount of evaporation depends upon the size of the lake. Defendant alleges that the amount of water from the Truckee River required to replace evaporation from the lake has been estimated at between 375,000 acre feet and 400,000 acre feet per year. This defendant denies, all and singular, the other allegations of said sentence.

(g) In regard to the allegations of the eighth sentence of said Paragraph, this defendant alleges that over the period 1918 to 1973, the average flow into the lake from the Truckee River has been approximately 250,000

acre feet. This defendant denies, all and singular, the other allegations of said sentence.

This defendant alleges that average flows, average deficits and statistics regarding averages have no real significance in respect to the claims of the United States in the instant case because of the absolute (rather than average) nature of the water rights which are sought by the plaintiff which would take priority over almost all existing water rights heretofore established and used on the river. According to the first prayer of the plaintiff's Complaint, the plaintiff seeks to have the measure of its alleged right set in acre feet per year and rate of flow, not on an average but as an absolute guaranteed right for each year.

(h) In regard to the allegations of the ninth sentence of said Paragraph, this defendant denies that the level of Pyramid Lake has dropped primarily because of diversion of water from the Truckee River. Pyramid Lake is a part of the ancient Lake Lahontan and has been diminishing in size since time immemorial and continues to do so. Lake Lahontan at one time covered most of Northwestern Nevada and was many times the size of present Pyramid Lake. This defendant admits that the level of the lake has dropped more than 65.1 feet in elevation since 1906. This defendant further denies that diversions of water from the Truckee River have destroyed fisheries or threatened the extinction of species of trout native to the lake. This defendant alleges that the fisheries are now thriving in the lake. That fact is supported by the position taken and evidence presented by the United States in the case of *Pyramid Lake Indian Tribe v. Morton*, Civ. No. 2506-70 D.D.C., In the United States District Court for the District of Columbia. The amount of fish now in the lake is definitely on the increase. This defendant alleges that the increasing salinity of the lake has not affected the fishery, and if the lake diminishes in size to only two-thirds of its present

size, the salinity of the lake would not significantly affect the maintenance of the fisheries therein. This defendant denies that the fishery is now diminishing or that the continued existence of the lake as a useful body of water is threatened by present use under the Orr Ditch Final Decree. This defendant denies that any particular level of the lake equates with the ability of the lake to maintain a fishery therein. This defendant denies, all and singular, the other allegations contained in said sentence.

VI

In answer to the allegations of Paragraph VI of the Complaint, this defendant alleges as follows:

(a) This defendant denies, all and singular, the allegations contained in the first and second sentences of said Paragraph.

(b) In regard to the allegations of the third sentence of said Paragraph, this defendant admits fees have been charged by the Tribe for certain licenses for fishermen to fish in the fine fishery now maintained in the lake. For lack of information sufficient to form a belief as to the truth thereof, this defendant denies, all and singular, the other allegations of said sentence, it being unknown to this defendant what use has been made of such monies as may have been collected or what amount thereof may be.

(c) In regard to the allegations of the fourth sentence of said Paragraph, this defendant denies, all and singular, the allegations contained therein, in that this defendant alleges that the Tribe has not entirely relied upon the water from the Truckee River for maintenance of the lower segment of the Truckee River as a natural spawning ground for lake fish (even though substantial spawning does and has taken place in those locations), because, for many years last past, the said lake has been planted from fish hatcheries. There is presently a fish

hatchery in operation at the lake and other fish hatcheries operated by the Nevada Fish & Game Department, and the U.S Government located elsewhere, which are used to provide adequate supplies of fish for the lake. This defendant alleges that the Tribe has not relied upon the water from the Truckee River for maintenance of the lake for a fishery because the provision for any particular amount of water to be supplied to the lake or the maintenance of any particular level of the lake within now foreseeable limits is not commensurate with the maintenance of the fishery.

VII

In answer to the allegations of Paragraph VII of the Complaint, this defendant alleges as follows:

(a) This defendant denies, all and singular, the allegations contained in the first sentence of said Paragraph. This defendant alleges that the Pyramid Lake Indian Reservation was withdrawn and set aside for that purpose on December 8, 1859, by order of the Commissioner of the General Land Office, which said office had authority to segregate said lands from the public domain for said purpose. This defendant further alleges in this regard that this withdrawal was confirmed by order of the President on March 23, 1874, all as previously found and determined by the Court in the Orr Ditch Final Decree.

(b) This defendant denies, all and singular, the allegations contained in the second sentence of said Paragraph. This defendant alleges that the order by President Grant of March 23, 1874, confirms the withdrawal of said lands for an Indian reservation made by the Commissioner of the General Land Office on December 8, 1859.

(c) This defendant denies, all and singular, the allegations contained in the third sentence of said Paragraph. This defendant denies that Pyramid Lake was the aborig-

inal home of the Tribe and alleges that the Pyramid Lake Paiute Tribe of Indians consisted of a number of separate groups which traveled at different seasons of the year over large areas of Western Nevada and Eastern California as nomadic bands, and while certain of the members of said Tribe may, during certain portions of certain years, have resided at Pyramid Lake, this was by no means, as implied by the allegations of the Complaint, "the aboriginal home of the Indians". This defendant further alleges that the reservation was set aside to enable the members of the Tribe, who desired to reside there, together with those of the Washoe Tribe, to secure suitable homes where they could be protected from the encroachment of the Whites and might pursue agricultural activities, abandoning their aboriginal nomadic pursuits.

VIII

In answer to the allegations of Paragraph VIII of the Complaint, this defendant denies, all and singular, the said allegations except that this defendant admits that there was by implication, upon withdrawal of said lands for use as an Indian reservation reserved for benefit of the Tribe, sufficient water from the Truckee River for "Indian Purposes", which said purposes were adjudged in the Orr Ditch Final Decree to be irrigation and domestic uses. This defendant admits the allegation of the second sentence of said Paragraph VIII, but disputes the validity of such claim.

IX

In answer to the allegations of Paragraph IX of the Complaint, this defendant admits the allegations thereof, except as follows:

(a) This defendant denies that only a small percentage of the water diverted from the Truckee River for the Newlands Irrigation Project is used for irrigation within the Truckee Division of the project.

(b) This defendant denies the implication of plaintiff's pleading that the contract between the United States and the Truckee-Carson Irrigation District, dated December 18, 1926, as amended, is being terminated for violations of the terms of the contract. This defendant denies that the terms of the contract have been violated. This defendant admits that said notice was mailed as alleged in the Complaint, but denies that such notice effectively terminated the contract.

X

This defendant admits the allegations of Paragraph X of the Complaint.

XI

This defendant admits the allegations of Paragraph XI of the Complaint, but further alleges as follows in this regard:

In the event that a right to runoff waters is decreed for the Refuge by this Court, then such rights should be decreed in accordance with the Tripartite Agreement dated November 26, 1948, between the Truckee-Carson Irrigation District, the State Board of Fish and Game Commissioners of the State of Nevada, and the Fish and Wildlife Services of the Department of the Interior. This defendant alleges that if the prayers of the plaintiff's Complaint are granted, then the amount of water which may be received as runoff waters by the Refuge will be substantially reduced or nonexistent and that the Refuge will be either severely damaged or destroyed.

XII

This defendant admits the allegations of Paragraph XII of the Complaint, except that this defendant denies that the fishery at Pyramid Lake requires restoration, since the same is thriving at the present time and alleges that such modern facilities as are provided for by the Washoe Project Act provide the means by which the

fishery in the lower reaches of the river and at Pyramid Lake can be maintained through storage and release of water.

XIII

This defendant denies, all and singular, the allegations of Paragraph XIII of the Complaint. Particularly, defendant denies that the maintenance and preservation of the lake were purposes for which the Indian Reservation was created. Further, the Reclamation Act, Migratory Bird Conservation Act, and Washoe Project Act do not contain any exceptions relating to reservation and waters for the Tribe, and the other purposes and beneficial uses of the water of the river contemplated by the Reclamation Act, Migratory Bird Conservation Act and the Washoe Project Act are absolute and not subject by the provisions of said acts to any prior or previous right for use of water. The said acts authorize diversions of water from the river without any exceptions relating to the Tribe or the lake. This defendant further alleges that if the Tribe has a right to the use of the waters of the Truckee River for the purposes mentioned in Paragraph XIII (which this defendant denies), the authorization by Congress and the Department of the Interior and the construction of the Newlands Project with resultant diversions of water from the Truckee River constituted a taking by the United States of water rights that might otherwise have belonged to the Tribe (which this defendant denies) for which the sole remedy of the Tribe is just compensation from the United States.

XIV

This defendant admits the allegations of the first sentence of Paragraph XIV of the Complaint and denies the allegations of the second and third sentences of said Paragraph for lack of sufficient information and knowledge to form a belief as to the truth of the allegations contained in said sentences. This defendant reserves the

right to amend this Answer at such time as its separate motion for a more definite statement of the claim of the United States in this regard has been determined and plaintiff is required pursuant thereto to provide a more definite statement of its claim insofar as the amount of water claimed and the purposes for which such water might be used. Defendant incorporates herein the allegation contained in Paragraph I of this Answer, in that the Orr Ditch litigation and Orr Ditch Final Decree bar the assertion of the claim of the United States contained in Paragraphs XIV and XV of the Complaint.

XV

In answer to the allegations of Paragraph XV of the Complaint, this defendant admits that plaintiff claims a right to the use of waters in the National Forest Lands in the State of Nevada, but denies that such claims are valid. This defendant denies, all and singular, the remaining allegations contained in said paragraph. This defendant reserves the right to amend this Answer at such time as its separate motion for a more definite statement of the claim of the United States in this regard has been determined and plaintiff is required pursuant thereto to provide a more definite statement of its claim insofar as the amount of water claimed and the purposes for which such water might be used.

XVI

In answer to the allegations of Paragraph XVI of the Complaint, this defendant denies, all and singular, the same for lack of sufficient information and knowledge to form a belief as to the truth of the allegations thereof. This defendant reserves the right to amend this Answer at such time as its separate motion for a more definite statement of the claim of the United States in this regard has been determined and plaintiff is required pursuant thereto to provide a more definite statement of its claim.

XVII

In answer to the allegations of Paragraph XVII of the Complaint, this defendant denies, all and singular, the same for lack of sufficient information and knowledge to form a belief as to the truth of the allegations. The defendant reserves the right to amend this Answer at such time as its separate motion for a more definite statement of the claim of the United States in this regard has been determined and plaintiff is required pursuant thereto to provide a more definite statement of its claim.

XVIII

In answer to the allegations of Paragraph XVIII of the Complaint, this defendant denies, all and singular, the allegations contained therein, except that this defendant admits that on or about March 3, 1913, the United States brought the action referred to hereinabove which resulted in the Orr Ditch Final Decree. The Orr Ditch Final Decree fully and finally adjudicated and determined all of the water rights of the parties to the case for all purposes on the Truckee River and its tributaries, including but not limited to all rights of the United States in its own behalf and in its fiduciary capacity in behalf of the Tribe. This included not only water rights which were claimed at the time the suit was commenced but also many claims which arose during the 31-year course of the litigation and until the final decree was issued on September 8, 1944. As to the claims brought by plaintiff United States on behalf of the Tribe and in its own behalf in the Orr Ditch action, the purposes for which the Pyramid Lake Paiute Indian Reservation was created were fully determined and all of those purposes which necessitated and entitled the quieting of title to water rights in respect to the Indian Reservation were argued, litigated, decided and adjudged in the Orr Ditch litigation. The cause of action in the Orr Ditch case was, among other things, to quiet title in the United

States in its own behalf and on behalf of the Tribe to use of the waters of the Truckee River and its tributaries in Nevada for all purposes, forever. Any claims for additional uses or purposes which were not raised up until the time the Final Decree was issued in the Orr Ditch case were merged into the Orr Ditch Final Decree and are now forever barred by operation of law and by the terms of the Final Decree.

XIX

In answer to the allegations of Paragraph XIX of the Complaint, this defendant admits that the final decree in the Orr Ditch case was entered September 8, 1944. In respect to the other allegations of said Paragraph, this defendant alleges that all water rights of the Truckee River and its tributaries were adjudicated, settled and finally determined according to that Decree as between the parties thereto, including the United States in behalf of itself and in its fiduciary capacity in behalf of the Tribe. This defendant admits that the priority date for certain irrigation rights that were adjudicated to the Indian Reservation were adjudged to have a priority date of December 8, 1859. This defendant alleges that the entry of the Final Decree in the Orr Ditch case forecloses recognition of the claims asserted by plaintiff in the within action. This defendant denies, all and singular, all of the other allegations contained in said Paragraph. Reference is further made to the Answer of this defendant in respect to the allegations of Paragraph XVIII, all of which are incorporated herein by reference.

XX

In answer to the allegations of Paragraph XX of the Complaint, this defendant denies, all and singular, the allegations contained therein. This defendant alleges that the obligations of the United States in respect to irrigation and reclamation projects and in respect to its rights

and those of the Tribe in the waters of the Truckee River and its tributaries can be ascertained and determined from the terms of the Orr Ditch Final Decree, and the contract between the United States and the Truckee-Carson Irrigation District dated December 18, 1926.

XXI

In answer to the allegations of Paragraph XXI of the Complaint, it is the policy of the State of Nevada, according to its laws and statutes, that reasonable beneficial use should be made of all waters within the boundaries of the State, and that water may not be used in excess of that which is actually needed for such reasonable beneficial use. If, in fact, it is shown in the within litigation that water in excess of that needed for beneficial use is being applied to lands within the Truckee Basin, then it would be the policy of the State of Nevada to oppose such excess use, but if it be shown in the present litigation that only reasonable beneficial use is being made of water on lands within the Basin, then it is the policy of the State of Nevada to support such use.

In regard to the allegations of the second sentence of said Paragraph, this defendant is not aware of what "recent studies" plaintiff refers to, but this defendant alleges in this regard that more modern irrigation methods and control devices will improve the beneficial use of water in the Truckee Basin and improve efficiency.

This defendant denies that there is sufficient water in the Truckee River stream system to meet present adjudicated rights under the Orr Ditch Final Decree and also to meet the claims made in the within action by the plaintiff. Statistics maintained on Truckee River flow indicate that in nearly one-half of the past 50 years, there would have been no water for any use on the Truckee River and its tributaries other than to provide water to Pyramid Lake to maintain its level, if water were, in fact, to be adjudicated for that purpose. This

allegation is made in respect to plaintiff's request for between 375,000 and 400,000 acre feet of water per each year to maintain the level of the lake and the fact that the river, in 25 of the past 53 years, has flowed less than 400,000 acre feet. In the within action, the plaintiff seeks an absolute water right with an 1859 priority to maintain a fixed level of the lake. This claimed priority would take precedence over nearly every other right on the river and would be a first demand upon the flow of the river. The right sought herein by the United States for the Tribe does not reach the so-called surplus waters in the Truckee River Basin which in a few years flow over and above and in excess of decreed rights according to the Orr Ditch Final Decree. The Complaint by the plaintiff seeks an absolute water right and does not seek merely an average or pro rata share of waters in the system, but rather a water right in the usual sense in the western states which subscribe to the law of appropriation as such is modified by the definitions contained in the Winters cases. Therefore, the average flow of the river is irrelevant in determining the effect of adjudicating waters to maintain the level of the lake. The true test of adjudicating waters for that purpose is the actual flow of the stream each year.

If modern irrigation methods and control devices are significant in respect to the use of the waters of the Truckee River, which the State of Nevada believes to be true, then modern technology, in order to preserve and maintain a fishery in Pyramid Lake and in the lower reaches of the Truckee River, must also be considered significant in determining the rights which may be adjudicated to the United States for the Tribe in this action.

The State of Nevada alleges that the maintenance of any particular level of the lake is not the equivalent of the maintenance of a fishery and further alleges that if the Court were to determine that the fishery in the

lower reaches of the river and in Pyramid Lake are entitled by its order to be considered therein, the Court may order that the maintenance of the fishery can be maintained by such modern technology as may provide a fishery, such as fish hatcheries, dams, fish ladders, fishways, development of new species of trout, treatment of water, and many other modern technological devices, rather than through the adjudication of any amount of water to maintain the level of water in the lake.

This defendant denies, all and singular, the other allegations contained in said Paragraph.

XXII

In answer to the allegations of Paragraph XXII of the Complaint, this defendant denies, all and singular, said allegations. All unappropriated waters in the State of Nevada are subject to appropriation according to the laws and statutes of the State of Nevada by the filing of an application with the State Engineer of Nevada to appropriate water for any particular beneficial use prescribed in the statutes of the State. All the rights to the use of the water of the Truckee River and its tributaries in Nevada held by the United States on behalf of the Tribe, predating September 8, 1944, for all purposes were determined by the Orr Ditch Final Decree. The State of Nevada has given full force and effect to said Decree and has recognized all rights specified in that Decree. The State of Nevada recognizes all rights provided in the Decree or for which a valid application has been made to appropriate waters of the Truckee River and its tributaries in accordance with the laws of the State of Nevada. Neither the Orr Ditch Final Decree nor the provisions of any present application or permit are for water for Pyramid Lake. All permits issued by the State of Nevada are issued expressly subject to all existing lawful water rights.

AFFIRMATIVE DEFENSES

I

Plaintiff, in the Complaint, has failed to state a claim upon which relief can be granted.

II

As a separate defense to the allegations of the Complaint, defendant State of Nevada alleges as follows: On September 8, 1944, the District Court of the United States, in and for the District of Nevada, a court of competent jurisdiction, in the case entitled *United States of America vs. Orr Water Ditch Company, et al*, supra, issued a final decree that was a full and final determination and specification of all the relative rights of all the parties to the use of the water of the Truckee River and its tributaries in Nevada. The decree has not been modified or set aside and is still in full force and effect and a determination on the merits. The United States was a party to that action, both in its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians, and is bound in both capacities by said adjudication of all its rights to the use of said water. The plaintiff now claims rights to the use of said water other than those specified in the Orr Ditch Final Decree and with priorities predating the entry of said Decree. These claims, for fishing purposes on the Pyramid Lake Paiute Reservation, for national forest lands, for public water holes, for use in hot springs and mineral springs for curative purposes and for use in and on public lands, are separately and collectively claims within the Orr Ditch cause of action and are now barred by the doctrine of res judicata. In fact, fishing purposes and national forest lands were before the Orr Ditch Court, but no water rights for such purposes were granted.

The State of Nevada is successor in interest to water rights adjudicated in the Orr Ditch proceeding. The

State of Nevada also claims the right to assert the defense of collateral estoppel to protect water rights estimated in its behalf by the Orr Ditch court because the rights of the State of Nevada were considered in such a manner as to give rise to a status tantamount to that of a party and/or because party or privity status in the prior action is not required to raise collateral estoppel defensively under facts such as these.

III

As a separate defense to the allegations of the Complaint, defendant State of Nevada alleges as follows: On September 8, 1944, the District Court of the United States in and for the District of Nevada, a Court of competent jurisdiction, in the case entitled *United States of America vs. Orr Water Ditch Company, et al*, supra, issued a final decree that was a full and final determination and specification of all the relative rights of all the parties to the use of the water of the Truckee River and its tributaries in Nevada. The decree has not been modified or set aside and is still in full force and effect and is a determination on the merits. The United States was a party to that action, both in its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians, and is bound in both capacities by the determination of the issues litigated and necessary to the adjudication of all relative rights of the parties to the use of said waters. In the *Orr Ditch* case the United States alleged and presented evidence that fishing was a purpose for which the Pyramid Lake Reservation was established, but no water rights were allowed for such purposes. In the *Orr Ditch* case, the United States presented evidence of national forest land but no water rights were allowed for such purposes. The United States is estopped from asserting and relitigating claims for water rights from said water system for purposes of fishing on the Pyramid Lake Reservation or for purposes of national forest land under the doctrine of collateral estoppel.

The State of Nevada is successor in interest to water rights adjudicated in the Orr Ditch proceeding. The State of Nevada also claims the right to assert the defense of collateral estoppel to protect water rights estimated in its behalf by the Orr Ditch court because the rights of the State of Nevada were considered in such a manner as to give rise to a status tantamount to that of a party and/or because party or privity status in the prior action is not required to raise collateral estoppel defensively under facts such as these.

IV

The State of Nevada does not stand in parens patriae to represent and bind individual property owners in the State of Nevada so far as their individual property rights are concerned. The State of Nevada may stand in parens patriae as far as its own quasi-sovereign interests, apart from the rights of individual citizens, but this is a matter of election for the State, and the State cannot be compelled to be sued in this capacity. The status of parens patriae is not one which may be created by consent or which may be waived. This case involves a dispute as between the United States and various citizens of the State of Nevada and the State, in its proprietary capacity as the owner of certain water rights, and hence the State of Nevada does not stand as parens patriae for its citizens. All other like cases brought on the theory of the case of *Winters v. United States*, 207 U.S. 564 (1908), (which establishes the legal basis for what are known as "Winters Rights" or the "Winters Doctrine") are cases where the United States has sued the individual citizens and water users of a state and are not cases where the state has been sued as parens patriae for its citizens. *United States v. Nevada and California*, 412 U.S. 534, 93 S. Ct. 2763, 37 L. Ed. 2d 132, (1973), mandates that the United States bring its action against the individual users of waters in the Truckee River Basin rather than against the state in

parens patriae in their behalf. The allegations of Paragraph XXI of the Complaint raise issues between various citizens of the State of Nevada in respect to the beneficial use of waters.

V

For a further and separate affirmative defense, defendant alleges that the plaintiff has been guilty of laches and unreasonable delay in bringing this action; that the plaintiff should have asserted the claims it now makes in 1913 at the time of commencing the action known as *United States of America v. Orr Water Ditch Company, et al*, supra, and, in any event, should have asserted its claims prior to entry of the Temporary Restraining Order in said case on February 13, 1926; that the plaintiff, by its unreasonable delay, has led defendant to believe that additional claims would not be asserted and in reliance thereon, defendant and defendant's predecessors have expended large sums putting the waters of the Truckee River and its tributaries to beneficial uses. Since 1913, defendant and defendant's predecessors have improved their properties at great expense, made and constructed many projects and undertakings, and otherwise expended large sums of money, all in reliance on plaintiff's refusal to assert its rights, and defendant would suffer great and irreparable damage should plaintiff now be permitted to maintain its present claims for additional water for the purposes stated in plaintiff's Complaint, and thereby interfere with defendant's water rights decreed in the Orr Ditch Final Decree. The defendant State of Nevada will suffer further prejudice due to plaintiff's unreasonable delay in bringing this action when attempts are made to locate evidence and witnesses to meet claims for water rights with alleged priorities dating as early as 1859.

VI

Under Rule 12(b)(7) and Rule 19 of the Federal Rules of Civil Procedure, there are several thousand per-

sons, none of whom have been named as parties to this action, whose joinder as parties defendant herein is indispensable for a just adjudication of plaintiff's claim. It is unknown whether all of said persons can be made parties to this action because, among other things, it is not known whether all of said persons may be subject to service of process or the venue of this Court or will be joined in this action.

Unless each of said persons mentioned in the preceding paragraph, none of whom are named as parties defendant in this action, is made a party to the action, the action should not proceed in equity and good conscience and should be dismissed, said persons being regarded as indispensable parties. A judgment rendered in the absence of all of said persons would be prejudicial to them because it would be impractical for any of said persons to begin a new action to determine his or her individual water rights in respect to plaintiff and some of said persons may hold water rights senior or junior to the claim alleged by plaintiff.

Each of the said several thousand persons, who are not parties defendant, owns or claims water rights in the Truckee River and its tributaries. The total amount of water claimed by all of said persons is very substantial, being in an amount in excess of the total amount of water rights owned by present parties defendant to the within action according to the final decree in *United States of America v. Orr Water Ditch Company, et al*, supra. Any judgment rendered in the absence of all of said persons would be prejudicial to them because it would be impractical for said persons to begin a new suit or suits to determine these individual water rights and some of said persons may hold water rights senior or junior to the claim alleged by plaintiff.

The said several thousand persons who are not parties defendant and who own or claim water rights in the Truckee River and its tributaries are enumerated in the

Motion made by this defendant to dismiss for failure to join indispensable parties, and which said Motion is being filed contemporaneously with the filing of this Answer. Plaintiff having instituted this action seeking water rights on the Truckee River which are claimed to be senior in priority to rights of present named defendants, is bound to either add said persons as additional parties defendant or suffer dismissal of the case. The Court cannot in the instant proceedings enter a decree which can be administered effectively and practically on the river because so large a number of water rights would be outside the decree and would not be determined by the terms of the decree.

VII

All waters within the boundaries of the State of Nevada belong to the public and the same are subject to appropriation only in accordance with the laws and statutes of the State of Nevada. The State of Nevada may, therefore, not be sued in its governmental capacity and no cause of action is stated against the State of Nevada in its governmental capacity, as an issuer of permits to divert waters within this state.

VIII

For a further and separate affirmative defense, this defendant alleges that the plaintiff is estopped from asserting the claims for additional waters of the Truckee River as set out in plaintiff's Complaint by reason of the following facts and circumstances.

(A) Prior to 1913 and at all times since that date, defendant and defendant's predecessors have owned lands within the Truckee River watershed, which lands are of little or no value without the benefit of water diverted from the Truckee River or its tributaries.

(B) That defendant and defendant's predecessors have, since prior to 1913 and at all times since that date,

diverted water from the Truckee River and its tributaries and put said water to beneficial use on said lands and have constructed improvements and have spent large sums in reliance on the continued use of said water.

(C) That the plaintiff, in 1913, commenced the action known as *United States of America vs. Orr Water Ditch Company, et al*, supra, against defendant and defendant's predecessors to adjudicate the water rights of plaintiff in and to the waters of the Truckee River and its tributaries.

(D) That plaintiff, in bringing said action, knew that the defendant and the other defendants named in that action were diverting water from the Truckee River and that said defendants relied on said waters for their subsistence and livelihood; that the plaintiff also knew that additional improvements and expenditures would be made by defendant based on the water rights eventually decreed in said action.

(E) That the plaintiff, by its failure to assert the claims it is now asserting, induced the defendant to make additional improvements and expenditures, which improvements and expenditures were made in reliance on plaintiff's implicit representations that additional water would not be requested for any purpose other than that which was requested and decreed in said action.

(F) That but for the conduct of plaintiff in failing to assert all of its claims to waters of the Truckee River and its tributaries, the defendant would not have improved its property or expended the large sums required for that purpose.

(G) That the plaintiff has known since commencing its action in 1913, and especially since the entry of the final decree in that action in 1944, that defendant was continuing to improve and develop its property and to expend large sums in reliance on plaintiff's representations that it would not seek waters from the Truckee

River or its tributaries additional to those waters decreed to plaintiff in the Orr Ditch Final Decree.

(H) That if the defendant diverted any water from the Truckee River or its tributaries in derogation of the rights of plaintiff, it was with plaintiff's full knowledge, consent and acquiescence over a period of many years.

(I) That if plaintiff is now permitted to assert and maintain its additional claims to water from the Truckee River system after its representations, as aforesaid, to defendant, that it would not do so, the property of defendant will be substantially destroyed and of little or no value and the defendant will be irreparably injured.

IX

For a further and separate affirmative defense, defendant alleges that plaintiff waived its right to assert the claims for additional waters of the Truckee River, as set out in plaintiff's Complaint by reason of the following facts and circumstances.

(A) In both the original Complaint filed on March 3, 1913, and in the Amended Complaint filed on July 25, 1914, in *United States of America v. Orr Ditch Company, et al*, supra, the plaintiff, United States, contended that it was bringing the action on behalf of the Pyramid Lake Paiute Tribe seeking waters from the Truckee River for fishing, domestic use, irrigation and for certain other purposes for which the reservation was created.

(B) If the plaintiff did not pursue and litigate those claims set out in both of its Complaints and chose instead to litigate only its claims to waters for irrigation, it did so intentionally and with full knowledge that it was not seeking water for fishing or the other purposes set out in its own Complaints.

(C) That the plaintiff, by not litigating the claims set forth in its Complaints, thereby voluntarily relinquished

its legal right to litigate the said claims. That the election not to litigate the said claims was made with full knowledge of all the surrounding circumstances and the consequences thereof.

(D) Prior to the entry of the Orr Ditch Final Decree, the plaintiff had reserved the national forests, public water holes, hot springs and other public lands set forth in its Complaint in the within case, and the plaintiff knew that it claimed that said national forests, public water holes, hot springs and other public lands were entitled to the beneficial use of water from the Truckee River system at the time of reserving said property for said purposes. The plaintiff, with full knowledge of its rights to water for use on said lands and at said places, voluntarily and intentionally elected not to assert those rights and elected instead to relinquish all rights to water for said purposes.

(E) That in reliance on the waiver of said rights to water for the purposes aforementioned, the defendant and defendant's predecessors have expended large sums of money over many years improving properties which receive the beneficial use of waters from the Truckee River, which waters were decreed to defendant in *United States of America vs. Orr Water Ditch Company, et al*, supra.

(F) That but for the waiver of said rights by plaintiff and defendant's reliance thereon, defendant and defendant's predecessors would not have expended the substantial sums necessary to make the extensive improvements to said real property as aforesaid.

X

In respect to the allegations of Paragraph XVII of the Complaint and as an affirmative defense thereto, this defendant alleges that there is no legal authority for the proposition that under the so-called Winters Doctrine or any legal doctrine whereby water rights are set aside by implication through the withdrawal or reservation of

Federal lands for a special purpose, or any other legal authority in case law or statute, which would entitle the United States to a water right in respect to waters on the public lands because the Federal Government has used the same or commenced to use the same. The United States has never heretofore claimed the right to use of waters on the public lands without compliance with the water laws of the State of Nevada. Said Paragraph XVII of the Complaint does not allege any withdrawal of lands accompanying such diversion of water which would be a foundation for an implied reservation of water rights in favor of the Federal Government. All of the waters within the boundaries of the State of Nevada wheresoever situated belong to the public of the State of Nevada and are subject to appropriation only in accordance with the laws of the State of Nevada with which plaintiff has not complied.

XI

This defendant, State of Nevada, as and for a separate defense to the Complaint on file herein, does allege and aver as follows:

(a) The plaintiff, in its Complaint, makes a claim for additional water for Pyramid Lake for the benefit of the Tribe. The basis of this claim is a doctrine known as "Winters Rights", which were first recognized in *United States v. Winters, et al.*, supra.

(b) The doctrine of "Winters Rights" is based on the theory that when the federal government sets aside land for an Indian reservation, it thereby impliedly reserves sufficient water to irrigate the land reserved. This doctrine has been further narrowed by court interpretation to apply to sufficient water to irrigate only the irrigable land in the reservation. The purpose of the federal government in setting aside Indian reservations was to induce the Indians to relinquish their nomadic habits and to till the soil to promote their civilization and improvement.

(c) Plaintiff claims that it, as trustee for the Tribe, is entitled to the additional water claimed to maintain the lower reaches of the Truckee River and Pyramid Lake as a fishery, and to maintain the level of Pyramid Lake; however, there is no provision for establishing a Winters Right to water for the maintenance of a fishery or the maintenance of the level of a lake.

(d) If one of the purposes for which the reservation was set aside was to maintain a fishery, as claimed by plaintiff, this purpose was a temporary one, until the Indians had had sufficient time to cultivate the lands on their reservation and acquired enough skill as farmers to support themselves.

(e) If one of the purposes for which the reservation was set aside was for the maintenance of a fishery, as claimed by the plaintiff, this is not the same or equivalent to maintenance of the level of the lake. The fishery can easily be maintained without attempting to maintain the lake at its present size through the use of modern methods of fish husbandry.

XII

As a separate defense, defendant State of Nevada alleges that after a "balancing of the hardships," no rights to the use of the Truckee River or its tributaries in Nevada should be granted to the United States on behalf of the Pyramid Lake Paiute Tribe of Indians with an 1859 priority for purposes of maintaining a fishery. Underlying this defense is the principle that equity will not issue a decree that is inequitable, unjust or against public policy.

There is a strong public policy against the waste of water. Nevada is a desperately water-short area. A basic principle of the water law of Nevada and other water-short states is that water must be put to a productive and beneficial use. The *Winters* doctrine, developed by the United States Supreme Court, is consistent with this philosophy. Any decree which would result in a waste of

water would be unjust, inequitable and against public policy.

The assumption that the viability of Pyramid Lake as a fishery depends upon the maintenance of a particular level of water is erroneous. Even if the additional amount of water enhanced the lake's fishery, the incremental benefit would be minimal, especially after comparing the benefit to the amount of water required. Meanwhile, in some low water years, water users with junior water rights would be left with no water for their homes or occupations, thereby seriously endangering the commonweal and the economy of the State of Nevada.

To quiet title in the United States on behalf of the Pyramid Lake Paiute Tribe of Indians to 375,000 to 400,000 acre feet as prayed, for the sole purpose of attempting to enhance the continuing value of the lake as a fishery would constitute, in all or to a substantial extent, a waste of water. Almost all of those additional waters, if granted, would be lost to evaporation.

The relief sought would be of comparatively little or no value to the plaintiff, while the hardship on defendant State of Nevada, in its proprietary capacity, and to the public as a whole, would be severe.

XIII

As a separate defense, defendant State of Nevada respectfully urges that "reasonable alternative means" be considered by the court before any water rights be granted to the United States on behalf of the Pyramid Lake Paiute Tribe of Indians for the purpose of maintaining a fishery. Underlying this defense is the principle that a court of equity should flexibly frame relief to preserve the interests of the defendant without substantial injury to the plaintiff.

Defendant State of Nevada alleges that if water rights for the purposes of maintaining a fishery are granted as

prayed for, a severe hardship and substantial injury would befall this defendant in its proprietary capacity and also, the public as a whole. Such relief would result in a waste of water. Almost all of those additional waters, if granted, would be lost to evaporation. Yet, in some low water years, water users with junior water rights would be left with no water for their homes and occupations, thereby seriously endangering the commonweal and the economy of the State of Nevada. The State would also be left without water to conduct operations and provide services which require such water.

Since the need of the Tribe is solely to maintain a fishery, other reasonable means of providing this objective are available. The assumption that the viability of Pyramid Lake as a fishery depends on the maintenance of a particular level of water is erroneous. Relief that would provide a more adequate remedy for the Tribe yet reduce the hardship and injury to the defendants and the public could be fashioned.

Technological answers, such as fish ladders, fish hatcheries, treatment of the water, stocking the lake with supplemental fish, etc., should be explored. Any decree which ignores the progress that has been made since 1859 in techniques available to maintain a fishery is really a step backward. An important source of information which may prove useful in considering alternatives to the drastic and wasteful relief sought by the plaintiff is the Pyramid Lake Task Force Report (1971).

If it is determined, however, that there is not only a right to receive additional waters at Pyramid Lake, but also, after considering the equities of all the parties, a need to receive additional waters, then a relief other than absolute water rights should be considered. In this connection, the court in its discretion might enter decrees alternative to an absolute judgment for a specific amount of water to attain the objective sought, such that civil-

ization in Western Nevada might continue to be maintained and present uses preserved.

Defendant State of Nevada alleges that a grant of absolute water rights in the amount prayed with an 1859 priority for the purpose of maintaining a fishery would be inequitable and unjust.

XIV

As a separate defense, defendant State of Nevada alleges that an objective of the utmost importance to the *Orr Ditch* Court and the parties therein was to achieve finality and stability as to the relative rights of the water users of the Truckee River and its tributaries in Nevada. The doctrine of res judicata will ordinarily provide such protection. But the Court did not rely solely on the doctrine of res judicata to achieve that objective. A permanent injunction was entered on page 87 of the Orr Ditch Final Decree which perpetually enjoins and restrains the United States and others from claiming any rights to the use of the waters of the Truckee River and its tributaries in Nevada other than those rights specified in the Final Decree. Said injunction is not surplusage. It has a separate force of its own. This action may not be brought because the rights claimed by the United States are not specified by the Orr Ditch Final Decree and the assertion of those claims is in direct violation of said injunction. The State of Nevada is willing to concede, however, that by implication the injunction will reach only claims for water rights with priorities predating the entry of the Orr Ditch Final Decree on September 8, 1944, and not such claims as the claim for the Stillwater National Wildlife Refuge with a priority date of 1948.

XV

As a separate defense, defendant State of Nevada alleges that this Court lacks jurisdiction over this subject matter and the parties hereto who are bound by the Orr

Ditch Final Decree. The Orr Ditch Final Decree included a permanent injunction which perpetually enjoins and restrains the parties, their agents and successors and others described therein from claiming any rights to the use of the Truckee River and its tributaries in Nevada other than those specified in the Orr Ditch Final Decree. The Orr Ditch Court thereby retained jurisdiction over later claims made by said parties, their agents and others to rights to the use of said waters and also to enforce said injunction. Either the United States is in contempt of said injunction or the essence of their claims is for an interpretation of the Orr Ditch Final Decree. In either event, jurisdiction over this subject matter belongs within the Orr Ditch case and not in a separate action. The State of Nevada is willing to concede, however, that by implication the injunction will reach only claims for water rights with priorities predating the entry of the Orr Ditch Final Decree on September 8, 1944, and not claims such as the claim for the Stillwater Wildlife Refuge, as aforesaid.

COUNTERCLAIMS

First Counterclaim

For a First Counterclaim against plaintiff, defendant alleges as follows:

I

That in initiating part of this lawsuit in its fiduciary capacity on behalf of the Pyramid Lake Tribe of Paiute Indians, it was the Department of Interior, through its Bureau of Indian Affairs, as the federal agency charged with maintaining the fiduciary responsibility of the United States Government toward the Indians, which was responsible for the initiation of this lawsuit against defendant, State of Nevada.

II

That the National Environmental Policy Act, P.L. 91-190, 83 Stat. 852-853, 42 U.S.C.A. 4321-4332, Jan. 1,

1970 (hereinafter sometimes referred to as "N.E.P.A."), declares that:

> "The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." § 4321

Section 4332 states:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality

of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

III

That the Department of Interior, in initiating this lawsuit, did not give consideration to the substantial adverse environmental effect upon the entire State of Nevada, particularly the western portion thereof, including the Lake Tahoe area, the Truckee Meadows, Washoe Lake area, Newlands Project area, Stillwater National Wildlife Refuge and the entire Truckee River drainage area. In addition to the effect on agriculture, urban life of the residents of the various settled areas and cities in the Truckee Basin, recreational activities on the various water areas of the Basin, municipal and domestic water supplies, particular consideration should be given of the Stillwater National Wildlife Refuge, which will be either very substantially reduced or destroyed if the relief prayed for in the Complaint is granted. The Stillwater National Wildlife Refuge is the largest national wildlife refuge in the United States, and both federal and state

governments as well as private parties have spent large sums of money to develop and protect the Refuge. The Refuge is on the Pacific Flyway where migrating wild fowl pass from Canada to Mexico each year and is the subject of international treaties with Canada. It is a very large area devoted to the wild fowl which reside there and who migrate to and from each year in the numbers of many thousands. The area includes areas where migrating or resident wild fowl may rest, receive and obtain sustenance, and other areas where hunting is permitted. This substantial adverse environmental impact would clearly result from the granting of relief prayed for by plaintiff, United States, on behalf of Pyramid Lake Paiute Indians.

IV

This defendant alleges on information and belief that neither the Department of Interior, nor any other agency, prior to the initiation of this lawsuit, or to this date, has prepared an Environmental Impact Statement dealing with the environmental effects of the result of this lawsuit, if the plaintiffs were successful, as required by N.E.P.A. and that the Department of Interior, in initiating this lawsuit, has acted inconsistently with the national policies set forth in said Act and is, therefore in violation of this statutory requirement to the detriment of the rights and interests of this defendant.

V

Even though Section 4332 of N.E.P.A. is directed to agency action in that it declares that "all agencies of the Federal Government shall", etc., it is defendant State of Nevada's contention that an environmental impact study is required in the within action even if this court does not find that agency action is involved.

Section 4331 of N.E.P.A. declares that:

> ". . . it is the continuing policy of the Federal Government, in cooperation with state and local gov-

ernments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations of Americans.

"In order to carry out the policy set forth in this chapter, *it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions,* programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

"The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." (Emphasis added)

Defendant State of Nevada contends that the within action is a "federal plan or function" contemplated by N.E.P.A. which will have a profound impact on the economy and environment of the State of Nevada and it should not be permitted to be maintained until an environmental impact study is made.

The impact of the within action on the State's environment cannot be known until such a study is made. Even though Section 4331 of N.E.P.A. does not direct that an environmental impact study be made in conjunction with every "federal plan and function" it is defendant's contention that the special circumstances of the within action give rise to the need for an environmental impact study to be made and is contemplated by said Section 4331 as a rational first step.

VI

Plaintiff has proposed, by the claims in its lawsuit, to effectively dry up the western portion of the State of Nevada, to irreparably injure the lands therein and the residents thereof, without the preparation and submission of an Environmental Impact Statement as required by N.E.P.A., without making due provisions for the protection of the lands covered by the lawsuit, and without considering the effect on the water supplies of all the affected inhabitants of the area, all to the injury of the defendant, as hereinabove set forth.

VII

That it would be unlawful according to N.E.P.A. for plaintiff to proceed herein without first obtaining an Environmental Impact Statement because the action of bringing and prosecuting the suit violates the said act unless such statement is first obtained.

Second Counterclaim

For a Second Counterclaim against plaintiff, defendant, State of Nevada, alleges as follows:

I

That the Final Decree in *United States of America v. Orr Water Ditch Company, et al.*, supra, directed that:

> "The parties . . . are . . . hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries . . . except the rights specified, determined and allowed by this decree, and each and all of said parties . . . are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with waters of the Truckee River . . . so as to in any manner prevent or interfere with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated by this decree. . ." Final Decree at P. 87.

II

That the plaintiff, by bringing the within action, is interfering with the rights of the defendant decreed as aforesaid and disregards the fact that it is perpetually restrained and enjoined from doing so.

III

That the plaintiff in bringing the within action knew that it was perpetually enjoined and restrained from

doing so and knew that it was interfering with the rights of defendant decreed to it in *United States of America v. Orr Water Ditch Company, et al*, supra, and acted maliciously and with the intent to interfere with defendant's decreed water rights.

IV

That in bringing the within the action in disregard of the said injunction and thereby interfering with defendant's rights, plaintiff has damaged defendant in the following manner:

A. Plaintiff's action has depressed the value of properties owned by the defendant which receive the benefit of water decreed to it in *United States of America v. Orr Water Ditch Company, et al.*, supra, in that the market value of said properties has substantially decreased since the defendant's water rights have been contested by plaintiff.

B. Plaintiff's action prohibits the defendant from developing its properties and the defendant will be unable to undertake or pursue any reasonable plan of development so long as its water rights are questioned by plaintiff.

C. Plaintiff's action has required the defendant to defend and thereby shift large amounts of resources to its defense and forego other projects of vast importance to the State of Nevada.

D. Plaintiff's action inhibits the commercial and economic development of western Nevada in that until the within action is finally determined industrial growth is minimal due to the fears of businessmen that water supplies will be decreased or curtailed.

V

That because of the action brought against defendant in disregard of the said injunction defendant has been damaged in an amount in excess of $10,000.00.

WHEREFORE, the State of Nevada prays this Honorable Court as follows:

(1) That the Complaint be dismissed with prejudice.

(2) That the Orr Ditch Final Decree be adjudged and decreed to govern all uses, by the parties thereto, of waters on the Truckee River and its tributaries.

(3) That the Court adjudge and decree that the United States, on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians, has no right to use of the waters of the Truckee River, and its tributaries, for the purposes alleged in its Complaint, and be *again* forever and perpetually enjoined and restrained from asserting or claiming *any* rights to said waters claimed in the Complaint, except as specified, determined and allowed in the Orr Ditch Final Decree.

(4) In respect to this defendant's First Counterclaim that prosecution of this lawsuit be stayed pending compliance by the Department of the Interior with N.E.P.A.

(5) In respect to defendant's First Counterclaim that the Court enter its judgment and decree that N.E.P.A. makes unlawful the initiation and prosecution of the subject proceedings until such time as an environmental impact study has been prepared, detailing its environmental impact and adverse environmental effects, the alternative to and the irreversible and irretrievable commitments of resources which would result in the implementation of the relief prayed for by the plaintiff in its Complaint.

(6) In respect to defendant's Second Counterclaim, that defendant have judgment against the plaintiff for a sum in excess of $10,000.00 with interest as provided by law.

(7) That this defendant have and recover the costs of the suit, together with reasonable attorneys' fees.

(8) For such other and further relief as shall appear proper.

Dated: August 15, 1974.

ROBERT LIST
Attorney General of Nevada

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Pacific Power Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987 BRT

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

ANSWER

COMES NOW defendant, SIERRA PACIFIC POWER COMPANY, and for answer to the complaint, admits, denies and alleges as follows:

FIRST DEFENSE

I.

Admits paragraph I.

II.

Admits the first sentence of Paragraph II. Denies the second sentence of paragraph II. Alleges that it is with-

out knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph II.

III.

Admits paragraph III and in that regard alleges that there are several tributary streams below Lake Tahoe which contribute substantially to the flow of the Truckee River.

IV.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph IV, except that it admits the first two sentences thereof.

V.

Admits that Pyramid Lake lies about 30 miles north of Reno, Nevada and is the natural terminus of the Truckee River and has no outlet. Admits that with the exception of precipitation and drainage amounting to an average of about 55,000 acre feet per year, the sole source of water for Pyramid Lake is the Truckee River. Admits that the level of the lake has dropped 70 feet since 1906 and in that regard alleges that the level thereof has risen about 11 feet during the past seven years. Alleges that the species of trout native to the lake became extinct in 1938 and that to maintain the present level of Pyramid Lake would not be a reasonable or beneficial use of the waters of the Truckee River. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph V.

VI.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph VI, except that it admits that the members of the Pyramid Lake Paiute Tribe of Indians have in recent time relied upon water from the Truckee River for irrigation and for domestic use.

VII.

Admits the first two sentences of paragraph VII and denies the balance thereof.

VIII.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs VIII, X, XI, XII, XIV, XV, XVI, XVII and XXII.

IX.

Admits paragraph IX.

X.

Denies paragraphs XIII and XX.

XI.

Denies paragraph XVIII, except that it admits that on February 3, 1913 the United States brought an action entitled *United States v. Orr Water Ditch Co., et al,* (Equity No. A-3) in the United States District Court for the District of Nevada.

XII.

Denies paragraph XIX, except that it admits that on September 8, 1944 a decree was entered in the aforesaid case of *United States v. Orr Water Ditch Co., et al,* and that the judgment of the court therein vested in the United States the right to use Truckee River water for the Newlands Project and to use Truckee River water on the Pyramid Lake Indian Reservation with a priority date of December 8, 1859. In that regard defendant alleges that the judgment in the aforesaid action determined, decreed and adjudged the several rights to the water of the Truckee River system among the various parties to that action. Denies that the judgment in that case did not foreclose recognition of the additional rights now asserted by the United States.

XIII.

To the extent that the allegations of paragraph XXI are intended to apply to this defendant, they are denied. Beyond that defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations thereof.

SECOND DEFENSE

On January 3, 1913, the plaintiff commenced a suit in equity in this court entitled *United States v. Orr Water Ditch Co., et al,* (Equity No. A-3) for the purpose of decreeing and quieting the plaintiff's title to the waters of the Truckee River and its tributaries in Nevada, both natural flow and flood waters, for the Pyramid Lake Indian Reservation and other federal uses. The final decree or judgment in that case was entered September 8, 1944 and it determined and settled the priorities, points of diversion and amounts of said water to which plaintiff on its own behalf and on behalf of the Pyramid Lake Tribe of Indians, this defendant and its predecessors in title were and are entitled. Plaintiff and all other parties and those claiming under them were forever enjoined from asserting or claiming any rights in or to the water of the Truckee River or its tributaries except as "specified, determined and allowed" by the decree itself. Plaintiff's claims are barred by the doctrine of res judicata.

THIRD DEFENSE

I.

In reliance upon the final decree in *Orr Water Ditch Company,* this defendant has since 1944 expended millions of dollars on its water system which serves the residents of the Reno-Sparks area. Thousands of other persons have devoted their energies and property to the development of their homes and business enterprises in reliance upon the finality and validity of that judgment and decree of this court.

II.

Plaintiff's claims if granted in full with their asserted priority dates would consume the entire water flow of the Truckee River in times of relative drought. Such an eventuality would disrupt the lives and decimate the fortunes of all those who reasonably relied upon finality of said decree.

III.

Plaintiff stood by for three decades before suggesting that the decree meant anything but what it says on its face. Accordingly, plaintiff is now estopped from asserting the additional water rights alleged in the complaint.

FOURTH DEFENSE

The doctrine of laches should be applied to and should bar plaintiff's present claims to additional water from the Truckee River because it did not take an appeal from the *Orr Water Ditch Company* decree and it did not otherwise express dissatisfaction with the amount of water granted it for the use of the Pyramid Lake Paiute Tribe for almost thirty (30) years. Because of the long delay in plaintiff's challenge to the completeness and finality of the 1944 decree, defendant will suffer great and irreparable injury if plaintiff is permitted to prosecute this action and obtain the use of its water sought by the complaint.

FIFTH DEFENSE

I.

Under the law of Nevada all waters within the state belong to the public and can be withdrawn and used only for beneficial purposes.

II.

Plaintiff here claims a right to use between 375,000 and 400,000 acre feet of water per year to offset the natural evaporation of Pyramid Lake and thus maintain

its present level. This defendant is informed and believes and therefore alleges that such use by plaintiff would consume the entire water flow of the Truckee River in approximately half of the years of every century and thus would destroy the farmlands, the homes and businesses up river.

III.

Such use of the waters of the Truckee River to offset the evaporation of Pyramid Lake would not be a reasonable and beneficial use of water in a water scarce area and instead would constitute a gross, unreasonable and unlawful waste of the area's most valuable resource.

SIXTH DEFENSE

Pursuant to an agreement between plaintiff and the Truckee-Carson Irrigation District dated December 18, 1926 and pursuant to the provisions of the final decree in the *Orr Water Ditch* case, plaintiff caused to be diverted waters of the Truckee River to the Newlands Irrigation Project. To the extent that any legally protected interest in those diverted waters has been invaded or appropriated, the sole remedy is the payment of just compensation to the owner or owners of such interest or interests.

SEVENTH DEFENSE

I.

Defendant is informed and believes and therefore alleges that there are numerous owners of water rights in the Lake Tahoe, Truckee, and Carson River basins who have not been named in this action, although each is subject to the jurisdiction of this court. Without the joinder of those parties pursuant to Rule 19 of the Federal Rules of Civil Procedure, there cannot be a complete and final adjudication of this dispute.

II.

The plaintiff should therefore be directed to join as indispensable parties all those persons within the State of Nevada who use the waters of the Truckee and Carson Rivers but have not yet been named as codefendants in this action.

EIGHTH DEFENSE

I.

Defendant is informed and believes and therefore alleges that plaintiff has the technical knowledge, the financial means, and the duty to effect water conservation measures in the Newlands Irrigation Project which would save approximately 95,000 acre feet of water per year.

II.

Defendant is informed and believes and therefore alleges that the Desert Research Institute of the University of Nevada, under contract with the United States, is conducting a weather modification study and program in the Truckee River basin, and the preliminary results of that study indicate that a continuing program of cloud seeding could generate up to 100,000 additional acre feet of water each year in the Truckee River system.

III.

This action is therefore premature, and all further proceedings herein should be stayed until the United States has completed all appropriate water conservation measures in the Newlands Irrigation Project area and all weather modification studies in the Truckee River basin so that the court and the parties herein may know with reasonable accuracy the amount of water in controversy.

NINTH DEFENSE

I.

Defendant is informed and believes and therefore alleges that the water quality of Pyramid Lake is deteriorating so rapidly that the lake may not be able to support fish life within another half century.

II.

Defendant is informed and believes and therefore alleges that plaintiff has made no plans or undertaken any actions whatever to maintain or improve the water quality of Pyramid Lake.

III.

The government's claim to water for the primary purpose of preserving the fishery in Pyramid Lake is meaningless without a comprehensive plan for maintaining water quality, and plaintiff should not be permitted to proceed in this action until it presents evidence of such a plan.

TENTH DEFENSE

I.

Defendant is informed and believes and therefore alleges that the United States has brought this action at the request and on behalf of the United States Department of Interior and the United States Department of Agriculture. Said departments are agencies of the plaintiff and would be the users in fact of the water rights sought by the complaint.

II.

Section 4332 of the National Environmental Policy Act, 42 USC §§ 4321, et seq. requires all agencies of the Federal Government to "include in every recommendation or report on proposals for legislation and *other major federal actions* significantly affecting the quality

of the human environment, a detailed statement by the responsible officials on

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

III.

The proposed use of the waters of the Truckee River by the Departments of Interior and Agriculture in the manner prayed for in the complaint constitute a proposed federal action which would affect the quality of the human environment. Neither agency has prepared and submitted a detailed environmental statement as required by law and until such compliance has been demonstrated no further proceedings in this action should be permitted.

ELEVENTH DEFENSE

To the extent that the problems of Pyramid Lake are man made, plaintiff has itself contributed largely to them by diverting significant amounts of water to areas outside the Truckee River basin, that is, to the Newlands Irrigation Project. Accordingly, plaintiff should not be permitted to invoke the equitable powers of this court to shift to this defendant or any other defendant the burden of correcting or alleviating those alleged problems.

TWELFTH DEFENSE

The complaint fails to state a claim upon which relief can be granted against this defendant.

WHEREFORE, this defendant prays that the complaint be dismissed, that it have its costs and such other relief as may be appropriate.

Dated this 14th day of August, 1974.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2967

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, INSOFAR AS THE STATE OF NEVADA IS SUED IN PARENS PATRIAE

Defendant, STATE OF NEVADA, moves the Court to dismiss the action herein as against the defendant, State of Nevada, so far as the State of Nevada is sued according to Paragraph II of the Complaint as parens patriae for its citizens, because in that regard the Complaint fails to state a claim against this defendant upon which relief can be granted.

This Motion is made on the ground that, as a matter of law, the State of Nevada may not be sued as party defendant in the capacity of parens patriae for its citizens.

In making this Motion, defendant will rely upon all of the documents and pleadings now on file in this action and upon Movant's Memorandum of Points and Authorities filed herewith. Movant will further rely upon a Reply Memorandum to be filed hereafter, pursuant to the applicable rules, should plaintiff file a responsive memorandum to this defendant's Points and Authorities filed herewith.

Defendant's Memorandum of Points and Authorities filed herewith are identical to the Points and Authorities heretofore filed by this defendant with this Court pursuant to its request made at the meeting of Counsel on January 28, 1974.

This is a Motion for Summary Judgment made according to Rule 56, Federal Rules of Civil Procedure and Rule 16 of the Rules of Practice of the United States District Court for the District of Nevada.

DATED: August 15, 1974.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2967

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

MEMORANDUM OF STATE OF NEVADA REGARDING PARENS PATRIAE

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I. INTRODUCTION

Pursuant to indicated desire of the Court, the State of Nevada respectfully submits the following brief on the subject of parens patriae, sometimes hereinafter simply referred to as "parens". The Court indicated at the meeting with counsel on January 28, 1974, that it would be helpful to have briefs filed on this subject, so that the Court might be advised early in the game on this question. At the time of the meeting, none of the defendants had been served with process, and at the present time certain of the defendants have now been served, including the State of Nevada. However, by Court Order all defendants (except as to Truckee-Carson Irrigation District) have until August 15, 1974, to answer or otherwise plead. Until all parties have been served, it seems difficult to bind individual party defendants respecting the parens question on which they may desire and be entitled to be heard pro or con. However, the parens question having been raised in the plaintiff's complaint and by the proposed intervenor, the Pyramid Lake Paiute Indian Tribe, it does appear beneficial to orderly disposition of the case to consider this matter now, on a preliminary basis. We feel, however, that before this consideration might be enlarged into the nature of a binding order, that Motions should be made by those who might contend for the various positions and viewpoints, and that such Motions should be disposed of according to the usual practices of the Court. We believe that the formal handling of this question should be delayed until all the defendants are served or have appeared and are required by orders of the Court and the form of Summons to answer or plead.

II. SUMMARY OF ARGUMENT

1. The State of Nevada cannot be required to appear in this case as a defendant in parens patriae. Whether or not the State of Nevada might desire to be named as

a defendant or even a plaintiff in this action in the capacity of parens patriae is a matter of option and right to be exercised by the State.

2. Should the State of Nevada elect to appear in this action in parens patriae, then such appearance and the effect of judgments and decrees of this Court would be limited to the general public interests of the State apart from the individual interests of any private property owners who are named as defendants.

3. The State of Nevada cannot appear or be retained in the case in a parens patriae capacity wherein the State would represent the private property owners (who are the defendants in this case), so that a judgment against the State would bind private property owners as to their individual property rights. Parens patriae jurisdiction in the sense of representing individual property rights cannot be conferred upon the State, even if the State desired to have such jurisdiction conferred upon it. Water rights are real property rights in Nevada, and must be asserted or defended by the individual owners of the rights.

III. ARGUMENT

1. The State of Nevada has not yet determined what position it might take in respect to parens patriae. It is the intention of the State, after determining its position, to file necessary pleadings so that its position can be adjudged by the Court and clarified. However, at this stage of the proceedings, it will undoubtedly be helpful to explore those guidelines applicable as a matter of law to the position that the State can and will have to take. There are certain definite legal limits which will govern what the State can do.

2. Examination of authority does not disclose any relevant cases where a State of the Union was required to be a defendant in the capacity of parens patriae in an action of this nature, with the following exceptions: None

of the exceptions presents a state as parens according to the usual definitions. The exceptions are:

> (a) Interstate water adjudications where the states are not really in parens patriae, but rather are acting as sovereigns with the status of independent nations in the same manner as the United States might act with regard to another country. The within case, however, is not a case involving equitable apportionment of an interstate stream, but rather is wholly confined to water uses within the State of Nevada. Hence for that factual reason alone, in any event, the interstate water apportionment cases do not apply to the within case, so as to cause the State of Nevada to be in parens for its individual citizens.
>
> (b) Boundary disputes between states. This is not a boundary dispute and, again, in such cases it appears that the states are acting as sovereigns under the Constitution and not in a sense of parens or "parent". Change of boundary line between states does not affect the individual property owners, who may own lands on one side or the other of a state boundary anyway. Boundary cases raise no issue as to the capacity of a state to seek relief or to be sued because the state is acting in a sovereign capacity and not on behalf of any individual citizen.

3. The evolvement of the theory of parens patriae and its present status is described in Malina and Blechman, *Parens Patriae Suits for Treble Damages under the Anti Trust Laws.* 65 Nw. U.I.Rev. 193 (1970), and in *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 Col. J.L. & Soc. Prob. 411 (1970), and by Justice Marshall in his Opinion in the United States Supreme Court in the case of *State of Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 92 S. Ct. 885, 31. L. Ed. (2d) 184 (1972). The term parens patriae has two quite different connotations,

deriving historically from two entire separate bodies of authority:

(a) The first deals with the application in this country of the so-called "Royal Prerogative" exercised by the King of England with respect to charities and specified types of incompetents,

(b) The second line of cases is of American origin and bears on the propriety of suits by a state to *protect* certain of its own *interests* in its so-called *quasi-sovereign capacity.*

4. Under the Royal Prerogative theory, the King retains certain duties and corresponding powers as "father of the country" or parens patriae. With the American Revolution, these powers of the English King passed to the governments of the various states and, in part, to the federal government. Blackstone speaks of the King as "the general guardian of all infants, idiots and lunatics," with general superintendence of "all charitable uses in the kingdom." This definition of parens patriae jurisdiction refers to infants, juveniles, mental incompetents and those who are unable to take care of themselves or protect themselves.

This type of parens patriae jurisdiction has been largely assumed by the states. However, its needs have been met by such things as "provisions for court-administered guardianships", *California v. Frito-Lay, Inc.*, 474 Fed. 2d 774 at 776 (Ninth Circuit, 1973), juvenile jurisdictions and other procedures which generally are designed to take care of disabled members of society. See also, the use of the term parens patriae in respect to the criminal law involving protection of public interests and of the right to incarcerate a juvenile who has committed a crime. *Johnson v. State*, 114 A. 2d 1 (1955) at page 5:

"This parens patriae jurisdiction is a right of sovereignty and imposes a duty on the sovereignty to

> protect the public interest and to protect such persons with disabilities who has no rightful protector."

This view of parens extends a power to the State and imposes a duty to infants and incompetents and other persons under disability, but is much broader and extends to "the personal liberty of persons who are under a disability whether by reason of infancy, incompetency, habitual drunkenness, imbecility, etc." *Johnson v. State*, supra, at page 5.

In *Calif. v. Frito-Lay*, supra, Judge Merrill indicates that if a state undertakes to represent individuals who are the disabled members of a class, it is really acting as a guardian ad litem, rather than in parens. Judge Merrill finds that although there are citizens who may not be able to secure relief by means other than having the states sue for their individual rights, and that the representation of them by a state is a worthy aim, this "is not the type of state action taken to afford the sort of benefit that the common law concept of parens patriae contemplates," *Calif. v. Frito-Lay*, supra, at page 777.

> "If a state is to be empowered to act in [this] fashion . . . we feel that authority must come not through jurisdictional improvisation, but by legislation and rule making where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems possessed by *one's assertion of power to deal with another's property and to commit him to actions taken on his behalf.*", *Calif. v. Frito-Lay*, supra, at page 777.

> "We conclude that the authority of the State to act . . . as representative of its citizens cannot be founded on its common law capacity as parens patriae." *California v. Frito-Lay, Inc.*, supra, at page 778.

While the *Frito-Lay* case involves the effort by a state to represent individual citizens under the Clayton antitrust law, the definition of what parens patriae is at law

is well defined and would seem to apply whether a state is plaintiff or defendant. No authority has been found, however, where a state has been required to act as defendant.

U. S. v. Union Pacific, 98 US 569 (1878) is a case where the United States sought to sue in parens to prevent looting of the corporation. Although a special act was passed by Congress, permitting the suit, the Supreme Court denied that the United States could sue in parens on the basis that there was no trust relationship between the railroad company and the United States. Malina and Blechman state at page 202 of their article that the Government's argument in Union Pacific,

> "marks the furtherest extent to which this branch of the royal prerogative has been stretched."

In *Kansas v. U. S.*, 204 US 331 (1907) the Supreme Court refused to ailow a suit by the State of Kansas as trustee for a railroad on the ground that the action was for the benefit of the railroad and that consequently the state was not the real party in interest. See also additional cases making the distinction between suits in behalf of private interests and suits relating to the quasi-sovereign interest of a state: *Oklahoma v. Atchison, Topeka and Santa Fe*, 220 US 277 (1911) and *Georgia v. Pennsylvania Railroad*, 324 US 439 (1945).

The conclusion must inexorably be reached that the State cannot, under parens patriae used in the Royal Prerogative sense, be sued as a representative of individual citizens or individual property rights.

5. The second line of cases regarding parens relate to the propriety of suits *by* a state, *as plaintiff*, to protect certain of its own interests in its so-called quasi-sovereign capacity. These cases have largely developed in a series of decisions dealing with the Supreme Court's original jurisdiction to hear controversies between states or between a state and a citizen of another state.

"Quasi-sovereign capacity" (or "interest") is a term which refers to certain legal rights that belong not to any specific individual or individuals, but to the populace, or a large portion thereof, generally, and has included "the health, comfort and welfare of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state." *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079 at 1089, *State Protection of the Economy and Environment*, supra.

> "It was not until the end of the 19th Century that states began to premise their suits upon the general health, safety and welfare of their populations—interests which a private party would not have standing to raise." Malina and Blechman, supra, at 203.

These suits represent protection of the type of interests which sovereign nations would have a duty to protect. In *Louisiana v. Texas*, 176 U. S. 1 (1899), the Supreme Court stated at page 19:

> "The cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of *affect her citizens at large.*" (Emphasis supplied)

Elsewhere in this opinion, the Court noted that

> "[The] gravamen [of the bill] is not a special or peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of parens patriae, trustee, guardian or representative of all of her citizens." (At page 19)

In *Louisiana v. Texas*, supra, the Court, at page 19, quotes with approval from *In Re Debs*, 158 U.S. 564, 586 (1895):

> "While it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties."

There are two basic requisites to the quasi-sovereign aspect of parens that must exist before the state may exercise such power:

> "first, the sovereign (or quasi-sovereign) interests to be *afforded judicial recognition must be related to corresponding duties owed by the sovereign to its citizens*; *and second, the wrong complained of must 'affect the public at large,' not merely the interests of particular individuals.*" (Emphasis supplied) Malina and Blechman, supra, at page 205.

We must ask in the instant case if there is an absolute duty on the state to act in parens, or rather whether the questions presented give the state an option to determine if its quasi-sovereign interests are affected and thus to elect to enter the suit on that basis or not. We must ask in the instant case if the "public at large" is affected or only certain individual property rights, to determine if the quasi-sovereign interests of the state are affected.

This distinction between the parens jurisdiction of a state in protecting its quasi-sovereign interests, as opposed to actions in regard to individual property rights or claims, is well defined by Justice Marshall in the

Hawaii v. Standard Oil Company case, supra, at page 258 in 405 U.S.

> "This Court recognized that Louisiana in the *Louisiana v. Texas* case, supra, was attempting to sue, not because of any particular injury to a business of the State, but as parens patriae for all of her citizens."

A long series of cases cited by Justice Marshall in the Hawaii case establish the right of a state to *sue* as parens patriae to prevent or repair harm to its quasi-sovereign interests.

In *Minnesota v. Benson*, 274 F.2d 764, (Court of Appeals District of Columbia, 1960), Minnesota contended that a large part of its milk found a market beyond Minnesota and attempted to sue in behalf of her citizens and as representatives of her dairy industry adversely affected by milk marketing orders. The Court at page 766 states in answer to this contention:

> "We are of the view that the U.S. rather than Minnesota occupies a relationship of parens patriae to those who are said here to be adversely affected or aggrieved by this order issued by the Secretary."

In *Illinois v. Milwaukee*, 406 US 91, 96 (1972), the Court approves language in *New York v. New Jersey*, 345 US 369 at 372:

> "The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could in effect be drawn into an intramural dispute, over the distribution of water within the Commonwealth."

This case shows a distinction between individual water rights within a state, as opposed to the rights of the state itself.

In *Land O' Lakes v. Louisiana*, 160 F. Supp. 387 (1958) the State of Minnesota endeavored to intervene as a party plaintiff to represent the interests of all dried milk manufacturers in Minnesota who were not parties to the suit. The question is framed in a little different fashion than parens, but it appears to be the same thing, being, has Minnesota a justicible interest? The Court finds:

> "Such an interest is lacking when a state undertakes to sue for the particular benefit of a limited number of its citizens. In such a posture the state is a 'mere volunteer'. The state must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest. Apart from direct proprietory rights . . . a State may have such an interest only by virtue of its duty to protect the general welfare as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens." *Land O' Lakes v. Louisiana*, supra, at page 388.

In the *Land O' Lakes* case, Minnesota contended that milk was of such importance to Minnesota and its citizens that restriction on interstate distribution would directly and materially affect the welfare of the people of Minnesota. The Court says:

> "That before a state has standing to sue parens patriae it must be shown that the interest asserted materially affects the health and welfare of *all* the people of the state or at very least a substantial portion thereof." *Land O' Lakes v. Louisiana*, supra, at page 389. (Emphasis supplied)

It is difficult to know how many people have to be affected, but the test seems really to be not the number of people but whether a true quasi-sovereign interest is affected, as opposed to an individual interest..

6. Historically, the foregoing cases are the basis for establishment of the American concept of parens patriae wherein the state would have capacity to sue as a state (whether in the Supreme Court of the United States or elsewhere) to protect its quasi-sovereign interests, the sort of interests which do not relate to any particular citizen but which generally relate to health, safety and welfare of all the citizens of a state.

These cases have been used as a basis to permit states to bring suits in parens to protect environment, economy, and health and are based upon the duty of the sovereign. Parens in this sense must affect the interests of the public at large, not merely the interests of individuals. Justice Holmes in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) made the distinction between representation by a state of individual property interests and the legitimate interest of a state "in the welfare of the citizens, the interest which it asserts as parens patriae, independent of particular interests of individual citizens, even when it relates to the same subject matter."

In *New Hampshire v. Louisiana, and New York v. Louisiana*, 108 U.S. 76, the Supreme Court denied the plaintiff-states' capacity to sue as assignees of private parties for debts owed by a sister state. In this case, the Court made the distinction that when a citizen can sue for himself (or possibly by analogy in our case defend for himself) there is no necessity for power in his state to sue on his behalf and "we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case." See also *Kansas v. U.S.*, 220 U.S. 277 (1911), where the Court refused to permit a state to appear in parens when the persons directly injured could themselves sue.

One of the basic questions in the within case is whether a judgment against the state will bind the individual property owners. No authority has been found for the proposition that such a judgment against a state could

bind the individuals. Wherever the authority of the state to sue (and we assume by analogy to be sued) has been tested, the Courts have drawn a line between those cases where the state's quasi-sovereign interests were involved, with the state having the authority to sue, and those cases where individual interests and property were concerned and the state was found to have no authority to sue. There is no necessity for allowing states to protect individual interests where adequate safeguards exist in the private party's ability to bring suit himself. Two possible suits on the same claim otherwise might be a possibility.

Malina and Blechman, supra, at page 209, conclude that:

> "the State, as parens patriae, can bring suit only to protect the common welfare of its people as a whole. It cannot sue merely to promote the individual interests of some—*or even all*—of its citizens."

In the instant case, individual citizens have been sued and are presently being served and while they are large in number, mere numbers won't create parens jurisdiction in the state. Each citizen in the within case has his individual rights and can defend them. There is no necessity or duty in the state to defend. A judgment against the state would be fruitless and would not quiet title to the individuals' property rights. There is no showing that any of the defendants are under any disability where the state might be deemed to act in parens under the so-called "Royal Prerogative" theory and if such were deemed to occur as to any defendant, a guardian could be appointed under Nevada State law to represent the interest of such disabled person.

None of the foregoing authorities involve the situation where a state is required in this sense of *protecting* quasi-sovereign interests to be joined in a suit as a defendant. None of these authorities relate to or would permit suit by or against the state for the protection of individual property rights.

7. Water rights in the State of Nevada are of the nature of real property rights. *Carson City v. Estate of Simon M. Lompa*, 88 Nev. 541 (1972). Since the water rights which are the subject of the litigation are individual real property rights, it appears that even if the State desired to represent the individual defendants who own these rights, that it could not, under the common law definition of parens patriae. All of the foregoing authority draw a distinction between the Royal Prerogative which relates to representation of disabled persons and charities and quasi-sovereign interests which are apart for interests of individual citizens, but none of them would assert the common law doctrine of parens patriae that would permit a state to represent individual real property interests or individual interests and rights of any kind, even if *all* of the citizens of the state were involved and, in this case, they are not.

8. In fact, in this case, various citizens of Nevada may have different viewpoints and different interests. The members of the Pyramid Lake Paiute Tribe are citizens of Nevada and occupy a considerable portion of the State. The Citizenship Acts of June 2, 1924, 43 Stat. 253, now 8 USC § 1401, gave all Indians full citizenship, and subjected them to all of its privileges and obligations. By virtue of the Fourteenth Amendment to the Federal Constitution, Indians, as citizens of the United States automatically become citizens of the State of their residence. *Law and The American Indian*, by Monroe E. Price, Contemporary Legal Education Series, Bobbs-Merrill Company (1973) at page 225, and 235-7. The quasi-sovereign sense of parens requires representation of all the citizens of a state, not merely those of a particular race or creed. C.F. NRS 502.280. While Indians may be subject to the application of some laws, different from other citizens, basically they are and remain entitled to the rights of citizens of the state in which they reside. See *American Indians Civil Rights Handbook*, U.S. Commission On Civil

Rights, Clearing House Publication No. 33 (March 1972), at pages 57-58, respecting rights to vote in State and local elections. See also *The States and Their Indian Citizens*, by Theodore W. Taylor, U.S. Dept. of the Indians, Bureau of Indian Affairs (1972) at page 91.

9. The State cannot be required to remain as a defendant, in the broad quasi-sovereign sense of parens, unless it chooses to do so. If the State desired to do so, it could not under the definition of parens represent the individual real property interests, which the defendants have in the waters of the Truckee River, and thereby bind the individual property owners who are named as defendants in this case. This is simply beyond the definition of parens patriae and as Judge Merrill states in *Frito-Lay*, ventures into an uncertain area (which at best has doubtful Constitutional basis) and has no basis in statute or cases.

The case of *California v. U.S.*, 180 Fed. 2d 596 (1950) contains some earlier comments and distinctions from the Ninth Circuit of what parens is and while this earlier case may not be as precise and direct as the Frito-Lay decision in the Ninth Circuit, we think it supports drawing the distinction between the State as parens in the sense of defending the general welfare, as contrasted with representing individual private property interests. The majority decision in *California v. U.S.*, supra, finds that the State may, as a matter of right, be permitted to intervene as a defendant where (see page 601 quoting *Kansas v. Colorado*, 206, U.S. 46, at page 99, supra), "it is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights". Again at page 602, the Court states: "The State of California has as the proper representative of the public welfare, a right to be heard as intervenor between these two proposed private users of its waters, aside from all other considerations."

The Court does not impose any obligation on the State of California to appear in parens, but phrases it as a

right. The Court does not view this right in a sense that would impose jurisdiction whereby a suit could forcibly be lodged against a state in the quasi-sovereign sense of parens and certainly not in a sense of representing other individual licensees who could be bound by a judgment against the state.

10. The Court in *California v. U.S., supra,* goes on to delve into the area of whether the State is the owner of the subject water, with the individual users as mere licensees or whether the individuals are the owners, and finds that the State of California is the absolute owner of all water within its boundaries (subject to licenses for use of the same) and therefore permits intervention on this latter point as well. This latter point is strenuously debated by Judge Pope in his dissent. Judge Pope argues that the State of California is really not asserting any ownership right in the water. In Nevada by contrast, individual owners of water rights are (possibly in contravention to the California law) the owners of actual real property rights in such water rights and the State, except in a very broad general and technical sense, is not the owner of water rights. See *Carson City v. Estate of Simon M. Lompa,* supra.

This broad sense of a state owning all the underlying water rights in that state approaches a quasi-sovereign, or even sovereign, parens jurisdiction of a state. Even the majority opinion in *California v. U.S.*, supra, does not assert that the judgment of the State would bind the Sierra Valley Water Company but the Court says at page 599 that the "Water Company can only assert in Court the rights of its shareholders and cannot adequately protect the states' interest in the public welfare. . .". There were many other private users on the Truckee River in California at the time this case was heard, and no one has contended in the Sierra Valley case, or elsewhere, that the Sierra Valley Decree bound any other private users on the Truckee River except for the Sierra Valley Water

Company, because the State of California was permitted to intervene in parens.

This case of *California v. U.S.*, supra, is interesting because both the majority and dissenting opinions treat the United States, in seeking to quiet title on behalf of the Pyramid Lake Paiute Tribe, the Newlands Reclamation Project, etc., as no different than any other private appropriator and entitled to adjudication of waters with relative priority with other users, with the measure of the rights according to fixed measurements, although dependent as to amount on federal common law as defined in *U.S. v. Winters*, infra.

11. Finally, in the prior case in the line of litigation now before the Court, *U.S. v. Nevada and California*, 412 U.S. 534, 93 S. Ct. 2763, 37 L. Ed. 2d 132, 1973), the United States Supreme Court, we feel virtually mandates that the individual water users have their day in Court, as individual defendants, and are not bound by any decree or judgment against the state in a parens capacity as to their individual rights.

The Supreme Court in a per curiam decision in regard to this same subject matter refused original jurisdiction because, among other things, individual users of water in Nevada could not intervene in the Supreme Court. The Supreme Court indicates at page 538 in 412 U.S., that the individual water users should "have an opportunity to participate in their own behalf . . . [as] . . . this litigation goes forward in the District Court." This was an important consideration in rejection of original jurisdiction.

The Supreme Court mentions the parens role of Nevada in representing users in its own state, but only insofar as an interstate allocation, vis a vis California. The Court finds there is no present dispute between the states. The states have settled the interstate apportionment of the stream by agreement.

12. It seems worthwhile to briefly discuss the nature of a so-called Winters Right, as it may relate to the question of parens. Winters rights were first defined in *Winters v. U.S.*, 207 U.S. 564 (1907). In essence, when an Indian reservation is established in the United States, there are reserved by implication from sources of water at the reservation waters for use on the reservation in an amount "arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which lands had been reserved." *U.S. v. Walker River Irrigation District*, 104 F.2d 334 (1939) at 336. The case of *Arizona v. California*, 373 U.S. 546 (1963), appears to conclude that there is not too much difference in the application of this theory as between Indian Reservations and other federal reservations and the same rules may apply to each.

Waters and Water Rights, Robert E. Clark, et al, Vol. 2 (1967), at page 388, indicates that "the priority of the Indian water rights (and we presume the same idea may apply to other Federal reservation rights) is the date the reservation was set aside for Indian use, either by treaty, by Act of Congress or by Executive Order." In *Arizona v. California*, supra, at page 600, the Court states:

> "We follow [Winters] now and agree the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created."

It is to be noted in *Arizona v. California* a fixed amount of water right was adjudged to the Indians with a fixed priority, and Justice Black states at page 600:

> "We also agree with the Master's conclusion as to the quantity of water intended to be reserved."

In each Winters Right case, in states which apply the law of prior appropriation, the so-called Winters Rights have been given a quantity assignment and a priority date

which is relative to other quantities and priorities of other private and public appropriators from the same source. For example, in *U.S. v. Orr Water Ditch Company*, et al, in the District Court of the United States, In and for the District of Nevada, in Equity Docket No. A3 (which is a typical Winters Rights case and the prior adjudication of the Truckee River) certain rights decreed to the Pyramid Lake Indian Tribe (which is given a priority date of December 8, 1859) and other rights are decreed to the other appropriators with priority dates both prior and subsequent to the Indians' rights.

Arizona v. California, supra, at page 597:

> "The doctrine of equitable apportionment is a method of resolving water disputes between the states. It was created by this Court in the exercise of its original jurisdiction over controversies in which states are parties. An Indian Reservation is not a state and while Congress has sometimes left Indian reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a state that its rights to water should be determined by the doctrine of equitable apportionment."

The Court rejects firmly and finally the proposition that the doctrine of equitable apportionment should be used to divide the water between the Indians and the other people of the State of Arizona.

In other words, Winters water rights established for Indian reservations, or other Federal reservations, are no different than other private appropriation rights on streams within a State, and in this case the rights for the Pyramid Lake Paiute Tribe Reservation have a fixed quantity and date of appropriation, the same as all other appropriators both public and private on the stream. The State may not be treated in parens as representing a package of the various individual water rights on a

stream, as contrasted with the federal rights on the same stream.

13. Since the United States has not attempted to fashion this case as a class action, we have not dealt with that subject. We do feel that there may be some overlap between parens patriae suits and class actions, but do not believe that the State of Nevada can properly be called upon to represent a class of over 12,000 individuals, many of whom have differing interests. It is essential that the parties named as representatives of a class have an interest in the litigation of sufficient magnitude that the rights of each class member will be asserted and fully litigated. The State of Nevada does not have such an interest in this action.

IV CONCLUSION

The State of Nevada simply does not stand in parens patriae in respect to individual water rights of the defendants. It could only stand in parens patriae as far as its own quasi-sovereign interests, which it may or may not, as the course of the litigation goes forward, determine it should assert here. Parens patriae is a common law jurisdiction of limited scope. The limit of the state's authority is its quasi-sovereign interests. If it be determined that the State of Nevada is properly sued in parens patriae, then we feel the judgment of the Court should be that it is in parens only in the broad quasi-sovereign sense apart from the rights of individual citizens and that it is not and cannot be sued as parens in a sense of representing individual property rights. The common law concept of parens which applies here simply doesn't extend to the proposition of a state being entitled or required, whether it wants to or not, to represent and bind individual property owners, so far as their individual rights are concerned.

DATED: February 26, 1974.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2967

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al,*
Defendants.

STATEMENT OF ISSUES OF MATERIAL FACT

This Statement is presented to the Court in compliance with Rule 16 of the Rules of Practice of the United States District Court for the District of Nevada.

The defendant, State of Nevada, has filed herein a Motion to Dismiss this action as to the State of Nevada, insofar as it is sued as a party defendant in its capacity of *parens patriae* for its citizens. Said Motion is made on the ground that as a matter of law, the State of Nevada may not be sued as *parens patriae* for its citizens as a party defendant. The Motion is made as a Motion for Summary Judgment according to Rule 56, Federal Rules

of Civil Procedure, and the said local rule 16. Since the Motion is made on a question of law, there are no facts which are material to the disposition of the Motion or which are genuinely in issue.

Dated: this 15 day of August, 1974.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2967

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al*,
Defendants.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SUMMARY JUDGMENT

The Court finds that the Complaint, among other things, brings an action against the defendant, State of Nevada, as a party defendant as *parens patriae* for its citizens. The Court concludes, as a matter of law, that the State of Nevada does not stand in the position of *parens patriae* in respect to individual water rights of the other defendant water users in the State of Nevada. The Court finds that the State of Nevada can only stand in *parens patriae* as far as its own quasi-sovereign interests, which

it is entitled to assert in these proceedings as it may choose. The State of Nevada has not elected at this time to assert its quasi-sovereign interest. The State of Nevada may not be required to assert such interest unless it shall choose to do so in these proceedings.

NOW, THEREFORE, it is hereby ordered that this action be dismissed with prejudice as to the defendant, State of Nevada, insofar as it is named as a party defendant in this action as *parens patriae* for its citizens.

Dated: August —, 1974.

United States District Judge

[Affidavit of Service by Mail Omitted in Printing]

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil No. R-2987 JBA

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

RESPONSE OF THE UNITED STATES TO THE MOTION TO DISMISS THE STATE OF NEVADA IN ITS PARENS PATRIAE CAPACITY

The United States in this action sued the State of Nevada in its parens patriae capacity, as well as its pro-

prietary and governmental capacities. The United States also named and has served almost 12,000 parties who may claim a right to the use of the waters of the Truckee River. In addition, by motion filed with this Court, the United States seeks leave to join an additional estimated 3,845 parties through either personal service or as a class.

The United States does not rely upon the State to represent in its parens patriae capacity the water users on the River upon whom it has obtained personal jurisdiction. The United States urges however, that the State in its parens patriae capacity can and should represent any individual not served who may claim an interest in the waters of the Truckee River. To the extent that representation by the State as parens patriae of the other water users already joined in this litigation could result in the United States losing jurisdiction over those served, the United States opposes such representation.

Thus, the United States opposes the motion to dismiss the State in its parens patriae capacity.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Applicant for Intervention

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

RESPONSE OF THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS TO THE MOTION TO DISMISS OF THE STATE OF NEVADA IN IT PARENS PATRIAE CAPACITY

The Pyramid Lake Paiute Tribe of Indians supplements its previous statements on the parens patriae issue, dated

March 1, 1974, and March 13, 1974, by the filing of this memorandum. The primary purpose of this memorandum is to expand our previous discussion of *Arizona v. California*, 373 U.S. 546 (1963) which we deem dispositive of this issue.

To understand why the State of Nevada may be sued in this action in its parens patrie capacity it is necessary to examine the nature of this lawsuit. This suit does not seek to define the rights of various water users on the Truckee River and is thus, not a general stream adjudication. Instead, the complaint and the proposed complaint in intervention seek to define various rights of the United States and the Pyramid Lake Paiute Tribe of Indians as against the total of existing rights on the Truckee River and its tributaries in the State of Nevada. No effort is made to define or attack the individual rights as established in *United States v. Orr Water Ditch Co., et al.*, Equity No. A-3, in this Court. It is specifically pointed out in the complaint in paragraph II that:

> "The United States does not dispute the rights decreed in that action (*Orr Water Ditch*). The defendants are made parties to this action because the relief sought by the United States would establish additional rights of the United States and the Pyramid Lake Paiute Indians to the use of the waters of the Truckee River and waters tributary thereto. Many of these additional rights of the United States would carry priority dates earlier than many of the rights decreed in the *Orr Water Ditch* Decree. These defendants are made parties to this action in order to give them notice and an opportunity to defend against the additional claims of the United States and the Pyramid Lake Paiute Indians."

Additional parties were joined on the assumption that "they claimed rights to the use of waters of the Truckee

River" not included in the *Orr Water Ditch* Decree. However, neither the complaint nor the complaint in intervention seek to define their specific rights.

The State of Nevada was joined as a party defendant in three capacities, its proprietary capacity, its governmental capacity and as parens patriae for its citizens. If the suit sought to quiet title to all the rights on the Truckee River, the State could not be expected to represent the various conflicting interests. This is not the situation in this litigation.

In the action entitled *United States v. Nevada and California*, 412 U.S. 534 (1973), the United States sought leave to file a complaint in the Supreme Court to determine the matters now presented in this action. Leave to file was denied due to the hesitancy of the Supreme Court to exercise its jurisdiction where the plaintiff has another forum,[1] *i.e.*, the District Court for the District of Nevada. Upon that basis the United States brought this action seeking the same relief. In this regard, the suit is clearly analagous to *Arizona v. California*, 373 U.S. 546 (1963).

Arizona v. California was initiated by Arizona as against California. Various other states, Nevada, Utah and New Mexico, either intervened or were joined as parties. With respect to the conflict between the States, the suit was similar to the traditional equitable apportionment suit, although vastly more complicated due to the Colorado River Compact, the Boulder Canyon Project Act and other factors. However, the United States intervened in the litigation. As noted by the Special Master:

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[1] The action in the Supreme Court was filed under Article III, Section 2 of the Constitution of the United States and 28 U.S.C., 1251(b)(2) which grants "original but not exclusive jurisdiction" to the Supreme Court. Suits such as *Arizona v. California*, 373 U.S. 546 (1963) were within the original and exclusive jurisdiction of the Supreme Court.

> Superimposed on all of these interstate controversies are the claims of the United States as against all of the States . . . . The United States . . . claims that it has reserved the use of water for the benefit of some 25 Indian Reservations and dozens of other Federal establishments located throughout the 132,000 square miles of the Lower Basin. Report of the Special Master dated December 5, 1960 at p. 6.*

The United States sought not only to exert a position as to the various federal legislation involved, it also sought determination of specific rights of the United States and the various Indian and Federal Reservations as against the various states. As a result of these claims raised by the United States against the states in their parens patriae capacity, the Special Master determined specific claims of the United States which were affirmed by the Supreme Court. 373 U.S. at 595-601. The Special Master approved water rights for the following Indian Reservations: Chemehueui, Cocopah, Yuma, Colorado River, and the Fort Mohave Indian Reservations, as well as several other federal enclaves in the Lower Basin States. The water rights thus adjudicated for the United States were charged directly against the apportionment of the particular state where the Federal enclave is located. 373 U.S. at 601. As explained by the Special Master:

> It has previously been concluded that consumptive uses of mainstream water by the United States on federal establishments were chargable to the state within which the use occurs. As a corollary to this proposition, I have also concluded that United States' uses in each state are limited by the apportionment

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* Later in the litigation, the claims of the United States were limited to the five Indian Reservations and the other Federal establishments on the lower Colorado River itself. The rights of the 20 Indian Reservations and the other Federal establishments on the lower Basin tributaries of the Colorado River were not adjudicated since the suit was limited to the main stem.

to the state in which the uses occur. *Thus the United States receives water in accordance with its priorities, and if the state apportionment is insufficient to satisfy all uses within the state, including federal uses, junior rights, whether acquired under state or federal law, must yield to senior rights within the state.* In other words, United States projects must be fitted into a schedule of priorities along with other uses within a state, and the state's mainstream apportionment will be used to satisfy uses within the state, beginning with the senior priority. If the apportionment is not sufficient to satisfy all uses, junior priorities will not receive water.

Nothing is left out of the accounting; nothing remains, therefore, for the United States, except as its uses come within a state's apportionment. The Project Act, in short, contemplates a division to total uses among three parties, Arizona, California and Nevada. No separate provision is made for the United States. If Congress had intended the apportionment to be made among four parties rather than the three it named, surely it would have said so. (footnote omitted, emphasis added).

The relief sought in this case is comparable to the relief granted to the United States by the Special Master and affirmed by the Supreme Court in *Arizona v. California.*

Another interesting point to be observed from *Arizona v. California* is that the Special Master specifically noted that "the State of New Mexico is bound by that decree (Gila River Decree) to the extent that her citizens, whom she represents parens patriae in this suit are bound. Special Master Report, at 328. Thus, the State of Nevada, in its parens patriae representation of the water users on the Truckee River with rights decreed in *Orr*

Water Ditch, stands in their place and stead as against the claims of the United States. This situation did not create a conflict in *Arizona v. California*, and it is difficult to see how one would develop here. See Nevada's Answer to the Complaint of the United States.

Other than the fact that this suit was brought in District Court rather than as an original jurisdiction action in the Supreme Court, it is impossible to distinguish the position the State of Nevada in this litigation, from the position the various states (including Nevada) in *Arizona v. California.*

Finally, it must be emphasized that the United States, when it sued the State of Nevada in its parens patriae capacity, did not attempt to limit participation in the suit by other water users or interested parties. The Supreme Court in *United States v. Nevada, supra*, indicated a desire that individual water users on the River have the right to participate in this action, but the Court does not state that the action would not proceed without them. In this regard, the Court noted that intervention would not normally be appropriate in the Supreme Court's original jurisdiction but they "would have an opportunity to participate" in the District Court proceeding.

There is no viable distinction in what is urged in this action and what was done in *Arizona v. California*, vis-a-vis the claims of the United States against the individual states. To require the State to represent water users parens patriae in this unique type of litigation provides a great opportunity for judicial economy, and may permit an extremely difficult and massive case to proceed in a more orderly manner. Water users not satisfied with the State's representation can appear, and most are already before the Court, thus, it is difficult to see how any interests could be prejudiced.

For the foregoing reasons the State's motion to dismiss should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

REPLY BRIEF OF STATE OF NEVADA TO BRIEFS FILED IN BEHALF OF PROPOSED INTERVENOR PYRAMID LAKE PAIUTE TRIBE OF INDIANS ON QUESTION OF PARENS PATRIAE

At the meeting of the Court and counsel on January 28, 1974, the Court requested that within thirty days thereafter, interested parties to the action file briefs on the subject of whether the State of Nevada might be sued as Parens Patriae (hereinafter sometimes referred to as parens) in this action. On February 27, 1974, the State of Nevada filed its brief. On March 5, 1974, the Pyramid Lake Paiute Tribe (the "Tribe"), the proposed Intervenor, filed a brief on the subject.

Later, on March 18, 1974, the Tribe filed an additional brief on the same subject purporting to answer the State

of Nevada brief, although no provision was made in the original Court Order for any answering briefs.

On August 15, 1974, the State filed a Motion to Dismiss the State as defendant in a parens capacity. This was based on the prior brief filed by the State of Nevada, which stressed that the State is only parens as to its quasi-sovereign interests or in interstate water adjudications or boundary disputes.

The Court, in its Order dated January 28, 1974, required that the plaintiff's response and the response of the Tribe to pleadings and motions, filed by defendants, be made by September 15, 1974, thirty days after the due date for defendants' response.

The Court in its Order of August 26, 1974, indicated its intent to hear the issue of parens at hearings scheduled for October 8, 1974.

Now, at this late date, on October 2, 1974, within four working days before the hearings of October 8, 1974, the State has received through the mail a further third brief from the Tribe purporting to belatedly answer the State's Motion for Dismissal, and seeking to shore up the Tribe's position on the subject.

Up to October 3, 1974, the State presumed that the United States conceded its position on parens since no previous briefs had been filed by the United States and since no opposition to the Motion had been made within the time fixed by the Court. However, on October 3, 1974, the State did receive a response from the United States which did largely concur with the view of the State, except in the areas of possible claimants to waters on the river who will not be named as individual party defendants or members of a class if the Motion of the United States to add additional defendants is granted. We have identified these issues and discussed them below in detail.

In spite of the time factor that we are faced with and in order to expedite the disposal of this point and to as-

sist the Court so that the hearings may proceed on October 8, 1974, as planned, the State has believed itself impelled to make a further statement to reply to the Tribe's third brief and to supplement its previous brief filed at request of the Court. The State's previous brief pretty well spanned the existing authority on the subject of parens. However, the briefs filed by the United States and the Tribe might, we feel, cloud the matter a bit, making it desirable that if the Court is going to see the overall picture here that there may be some additional review of the authorities at this time.

I. *The Law of this Case on Parens.*

A. *U.S. v. Nevada and California*, 412 U.S. 534, 93 S. Ct. 2763, 37 L. Ed. 2d 132 (1973), was heard in the United States Supreme Court on April 16, 1973. The subject matter before the Supreme Court was the same as the subject matter which has now become the content of the present case. This is particularly true on the parens question.

In the Supreme Court, the Solicitor General and the Tribe made the same contentions on the subject of parens as are now being made by the Tribe. They sought to sue the States of Nevada and California in the Supreme Court in their sovereign capacities to apportion or "allocate" a part of the Truckee River for the Pyramid Lake Indian Reservation, and other Federal uses, and to divide the balance of the water, if any, as between the States.

The petition of the United States (joined in by the Tribe) was rejected by the Supreme Court. The position now urged by the Tribe was rejected. The Supreme Court indicated that such a suit would not lie. The Supreme Court then proceeded to outline the procedures it deemed appropriate if the petitioners desired to proceed further. The Supreme Court, in its opinion, settled and outlined the law of the case and manner it might be approached in

the United States District Court for the District of Nevada.

B. *In what manner did the Supreme Court indicate in U.S. v. Nevada and California, supra, that the case should proceed in the U.S. District Court for Nevada?*

(1) The Court, in rejecting the petition, stated:

> "The dispute over the Orr Ditch Decree and the existence and extent of the prior water rights of the United States with respect to the Pyramid Lake Indian Reservation is within the jurisdiction of the District Court. We need not employ our original jurisdiction to settle *competing claims* to water within a single state." (Emphasis supplied)

The Court obviously viewed this case as involving competing various individual and Federal water rights claims within Nevada, and the determination of their relative priorities and extent, much in the same manner procedurally as the original Orr Ditch case. If the case was to be further pursued by the United States and the Tribe, it was, in view of the Court, a water adjudication, according to the usual practices in the Federal District Courts, between individual competing claims, both of private citizens, and the various claims now asserted by the Federal Government.

(2) The Supreme Court in *U.S. v. Nevada and California*, further stated:

> *"This is particularly the case where the individual users of water* in the Newlands Project, who ordinarily would have no right to intervene in an original action in this Court . . . *would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court."* (Emphasis supplied)

The State of Nevada contends this language in the Supreme Court opinion is the governing law of the case

and direction of the Supreme Court as to the manner in which the case should proceed on the parens question.

The Court obviously assumed that *all individual* users would have an opportunity to participate in their own behalf in the District Court, including not only Newlands users but all other individual users on the River.

(3) The United States thereafter on December 23, 1973, did proceed, following the pattern outlined by the Supreme Court for further proceedings, and filed its suit in the District Court for Nevada, naming as individual defendants some 13000 individual claimants to waters on the river.

Now the Tribe apparently seeks to detour from the road map set out by the Supreme Court when it dealt with this same exact issue.

We feel the directions in *U.S. v. Nevada and California* are clear and not subject to any interpretation except that the individual users will have "an opportunity to participate in their own behalf" as individual named defendants. The effect of applying the parens doctrine to users in Nevada would be to deny the individuals an opportunity to participate, except possibly as intervenors in the view of the Tribe, and if the State is permitted to be sued in parens, each individual citizen and property owner of water rights in Nevada would be bound by the judgment against the State.

C. The *U.S. v. Nevada and California* Court specifically considered the effect of *Arizona v. California*, 373 U.S. 546 (1963) in entering its opinion that the individual users would be the proper party defendants rather than the State in parens. The Court in *U.S. v. Nevada and California* interpreted the meaning of *Arizona v. California* as it would apply to this case. We need not speculate on the application of *Arizona v. California* to the instant case. The Supreme Court has done its job on this point.

The holding of *Arizona v. California* applicable to the subject question is that where there is a suit between states to apportion the waters of an interstate stream, all Federal uses will be charged to the state in which the Federal use occurs, *Arizona v. California*, supra, at page 601. Further, the United States may intervene in an interstate water apportionment case to make certain that the state in which the Federal use occurs receives an adequate apportionment so that the Federal use in that state will be satisfied.

Any adjudication of a Federal water right where a state might be treated as parens for all of its users (and thereby bind them) is limited to an interstate water equitable apportionment case where the respective shares of states in an interstate stream are determined and the Federal use within a state must be taken into account in making the apportionment which that state receives.

> "The *basic controversy* in the case is over *how much water each state has a legal right to use* out of the waters of the Colorado River and its tributaries." *Arizona v. California*, supra, at page 551. (Emphasis supplied)

Arizona v. California is a case distinguishable from the present case, because it involved an interstate water adjudication and did not involve settlement of "competing claims to water within a single state," as does the instant case. But, also, *Arizona v. California* turned on the meaning and scope of a Federal statute which was the basis of the apportionments made, rather than the theory of equitable apportionment.

> "As we see this case, the question of each State's share of the waters of the Colorado turns on the meaning and the scope of the Boulder Canyon Project Act passed by Congress in 1928." "*Boulder Canyon Project Act, 45 Stat 1057 (1928), 43 USC Para. 617-617t." *Arizona v. California*, supra, at pages 551, 552.

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The applicable Federal statute in *Arizona v. California* dictated the apportionment much as the guidelines set out by the Supreme Court in *U.S. v. Nevada and California* should, we think, dictate our further proceedings here.

> "The Act as finally passed did provide . . . a complete statutory apportionment, intended to put an end to the long standing dispute over Colorado River waters." *Arizona v. California*, supra, at page 560. Also see pages 565 and 575 for further comments by the Court on this topic.

D. The *U.S. v. Nevada and Califoria* Court, in interpreting effect of *Arizona v. California* on this case, follows the foregoing points we have made as to the meaning of *Arizona v. California*, as applied to the instant case.

> (1) *"For the purposes of dividing the waters of an interstate stream with another state, Nevada has the right,* parens patriae, to represent all non-Federal users in its own State insofar as the share allocated to the other State is concerned." *U.S. v. Nevada and California*, supra. (Emphasis supplied)

Note the care with which the Court limits the authority of Nevada to act in parens for its users:

(a) Only for purposes of dividing the waters of an interstate stream with another state.

(b) Only insofar as the share allocated to the other state is concerned.

(c) Nevada is given the right, but the Court does not state it is so obligated.

The *U.S. v. Nevada and California* Court goes on to say further on this issue in setting our course of action:

> "In that event, a dispute between the two states may arise, and the United States would then *perhaps have some ground to participate and assert that Cal-*

ifornia's share must be reduced in order to accommodate a prior, long established use by the United States in the State of Nevada." *U.S. v. Nevada and California*, supra. (Emphasis supplied)

The Supreme Court is clearly thinking of participation of the United States against a state *as such* (in its sovereign capacity or parens capacity) only where there is a dispute between two states in respect to allocating the water of an interstate stream between them. The Supreme Court has thus carefully limited suits by the United States against states and has not opened the door to ignoring individual claimants' rights which compete with a variety of Federal rights, by putting them on a parens sidetrack. The Supreme Court is thinking of these individual water users in Nevada as proper real party defendants to the action and not merely possible intervenors, whose intervention the Tribe says it won't object to.

II. *What, if anything, would be gained by making Nevada parens?*

A. If Nevada is parens for all its non-Federal users, the individual non-Federal users would be foreclosed their "opportunity" to participate in their own behalf. In *U.S. v. Nevada and California*, supra, the United States Supreme Court indicated this was a crucial, important right that should be extended to the individual users.

B. Nearly all the named individual defendants have been served with process and we may fairly presume that if additional parties defendant are added, they may also be served. There is no problem of jurisdiction of this Court over the subject matter of the case or the individual parties defendant. What has already occurred in this case, i.e., the naming of the individuals as defendants and serving them with process, really makes the parens point moot. The individuals are already in the case as they should be. A large number have engaged counsel to answer or plead and many have answered in pro per. It

cannot be seriously contended that all these people would now be backed out of the case or forbidden to further defend their rights. The United States, in the brief received by the State October 3, 1974, specifically agrees with the State on this issue.

Nor can it be seriously contended that parties who have not pleaded so far (and against whom no defaults can be taken according to this Court's Order) would be forbidden to come in actively if they want to do so. We believe their participation should be made as easy as possible and without the necessity of laborious motions to intervene.

In the event there are any parties defendant, present or future, who cannot be personally served with process, they may, as further outlined below, be served by publication and mailing upon an Order of the Court for substituted service entered under the applicable Nevada state statutes. The State has previously filed a brief with the Court providing authority for service in this manner. There is no practical or jurisdictional need for the State to be treated in a parens capacity in the existing posture of this case.

C. If the State of Nevada is held to be in parens so that its individual citizens are bound by a judgment against it, the basic nature of the case is totally changed. The case as now pleaded is a quiet title suit against certain named individual defendants. It does not purport to be a general quiet title suit against the whole world. A parens suit would be of the nature of a quiet title suit against the whole world in Nevada, because all Nevada citizens and property owners, not just the named defendants, would be bound by the judgment, whether they ever knew about the case or not.

Incidentally, the present case, under applicable Nevada law, might be converted to a general quiet title suit on proper motions and Order of the Court, but this approach, in preference to a parens approach, would provide addi-

tional protection to unnamed parties who might be bound because, for example, the applicable law would require research to locate all claimants on the river, to name them as defendants, and give them a chance to come into the case and defend their rights. Experience in quiet title actions indicates that research to carefully discover all of those persons who might have claims in respect to the waters of the river might be fruitful efforts, in fact desirable, if this action is to be expanded and altered from the suit against named defendants to a general quiet title suit. It is perhaps an easy way out to name the State in parens and thereby to avoid the necessity of endeavoring to run down and locate persons who may have claims in respect to the waters of the river and then to add them as defendants. But shouldn't this be done? Wouldn't it be a fairer thing for the United States to make a Motion to change this basic characteristic of the case if it wishes to enlarge the case to a general quiet title suit? If such Motion is granted, then the statutes of the State of Nevada which would then apply can be followed. These quiet title statutes are carefully designed to give a maximum reasonable amount of protection to individuals who may own or claim rights in the subject matter property. If the Court permits the State to be cast in a role of parens as to individuals who have not been named, or are not hereafter named, as parties defendant, then these other people will simply wake up some day and find themselves bound by a judgment against the State and their rights gone. It appears to the State that basic constitutional due process requirements as to individual claimants not named as defendants in the case would require that the safeguards of quiet title actions be followed rather than endeavoring to shortcut those rights by naming the State in parens for those individuals not named as defendants.

The response of the United States to the Motion to Dismiss on the parens subject apparently addresses itself to this specific point, i.e., that the State be obligated to represent individuals who may claim an interest in the waters

of the river and who are "unserved". It is not made clear whether the United States is referring to individual named defendants not served or individuals who are not named as defendants, and for that reason, according to the present posture of the case, have not and might not be served. For the sake of argument at this point, we will assume that the United States is addressing itself to the possibility of binding individuals not named as defendants through a judgment against the State in parens. The foregoing discussion, we think, covers this point and indicates to the Court the desirablity of following the usual applicable quiet title methods of obtaining jurisdiction over unnamed or unknown persons who claim an interest in the subject property, rather than the parens approach for which there is no authority.

D. *Piecemeal Parens.* There are various ways that the plaintiff and the Tribe would seek to piecemeal the application of the parens doctrine. The theories of parens outlined in the Opening Brief of the State is based upon the proposition that the State is parent or guardian of its quasi-sovereign interests which are the interests of all of its citizens.

(1) *Parens for individuals who may claim an interest in the river but who are not named as defendants either through oversight or because their claims are unknown or unrecorded or because they have simply been excluded from this action in the preparation of lists of defendants.* This point, we think, is dealt with in the discussion in Paragraph C above, indicating the desirability of applying quiet title statute approaches which protect individual rights and meet due process requirements rather than naming the State as parens in an effort to sidetrack those rights. The State quiet title statutes further provide for means of serving process on individuals who may have claims, but who cannot be identified and added as parties defendant.

(2) *Individuals who are named as parties defendant but who cannot be served personally with process after a diligent effort has been made.* We understand that there are some defendants in this category. The State has previously filed a brief providing ample authority for the proposition that these defendants may be served upon Order of the Court by substituted service through mailing of process to their last known addresses and the publication of a Summons in a newspaper of general circulation. We feel that it is clear that service on these individuals may be made in this fashion. We also believe that the use of substituted service (rather than endeavoring to name the State in parens in an effort to bind these presently unserved defendants) will provide much greater protection for individual rights. If parens be applied to bind such defendants, there would be no due process notice given to them that they were being sued. Just because a process server could not locate them doesn't mean that they are not available to service. Mailing and publication will give these individually named defendants a much better chance to be advised of the suit and to defend themselves. We contend strenuously that constitutional due process requirements should obligate the plaintiff to make service on these named but personally unserved defendants in a manner of substituted service according to a further Order of the Court.

(3) *Persons who choose not to file an Answer or file an appearance.* The brief filed by the Tribe on March 5, 1974, appears to request that the Court cast the State in a parens capacity for purposes of representing individuals in this category. While later briefs filed by the Tribe appear possibly to enlarge the concept of parens beyond the prayer of the first brief, let us address ourselves to what we may presume is the intent of the Tribe in pursuing this point, i.e., to require that the State represent parties who choose not to file an answer of appearance, in a parens capacity. We think that the prayer of the March 5, 1974, brief and the Tribe's brief received by the State

on October 2, 1974, are the same and what the Tribe really is seeking is a limited application of parens to parties who choose not to answer or defend. In the latter brief, the Tribe states that water users not satisfied with the State's representation can appear and most are already before the Court. This phraseology indicates that the Tribe would not want to force the State as parens into the place of those who have already appeared but only upon those who are named defendants but haven't appeared or answered.

It appears that this point can be disposed of by pointing out that the Court does have jurisdiction over the subject matter and the individual named defendants and that as a matter of jurisdiction, there is no need to require that the State act in parens for such individuals. While this might be a desirable service for the State to provide, it seems to be subject to the discretion of the legislative and executive branches of the Nevada State Government as to whether it can afford to do so or should represent specific individuals in a lawsuit, even one that seeks to take away their property rights, and as reflected in the Opening Brief of the State, the State does not have authority under interpretations of the parens doctrine to represent individual property rights even if in its discretion it desired to do so.

(4) There are at present many prospective individual parties defendant who are not yet officially in the case and whose addition as defendants is anticipated. For this parens issue to be decided now against them, foreclosing their right to be parties defendant and to be reduced to mere possible intervenors without right to notice, because the State has been substituted for them in parens, seems unfair and premature and seems to seriously prejudice their rights.

D. Another approach, if the case is to converted from a suit against specific named defendants to a general quiet title suit against the whole world, would be to approach

it according to the rules applicable to a general administrative stream adjudication in the Office of the State Engineer of Nevada, according to Nevada law. Such a handling of the case would provide due process notice to persons who may claim an interest in water rights on the river through publication and mailing of various types of notices and through additional research of records to ascertain known water rights. Under this type of procedure, if additional persons do appear who claim an interest in the river, they are given a certain period of time to file documents supporting their claim and indicating its priority, extent, and covering the other basic characteristics of Nevada water rights.

E. *Piecemeal Parens.* No authority is stated for holding the State to be parens for defendants who don't want to answer or participate as suggested in the Tribe's brief filed March 5, 1974, and in the Reply Brief filed by the United States received by the State October 3, 1974.

F. *Whose obligation is it to provide authority that the State may be sued in parens?*

(1) The United States and the Tribe seek to sue the State in this fashion, and it is, therefore, their obligation to provide authority to support bringing such an action.

(2) The State defends saying there is no authority or good reason for bringing such an action against the State, and if there is none, there is no basis to go forward with a suit against the State in parens.

III. *Dealing with some miscellaneous additional points (not previously dealt with) raised in the three briefs the Tribe has now filed on this subject.*

A. We urge that the Court should proceed very cautiously into the area of binding the citizens of the State as to their individual property rights by casting the State in a parens posture, where there is no real authority to proceed. We are dealing with individual property rights

of citizens and they should not be taken away thereby depriving the citizens of an opportunity to defend those rights.

The right of the individual property owners to "have an opportunity to participate" in the defense of their rights is not framed in terms of a mere right to intervene by the *U.S. v. Nevada and California* Court. It is framed in terms of a real constitutional right which cannot be taken without the affected individual being named as a defendant, served with process and given an opportunity to defend as a real party. No authority has been cited for the proposition that a state may be parens and yet individual intervenors still retain separate justiciable rights. Intervention to help with the case is a far cry from a real right to defend one's individual property rights as a party.

B. The basis of parens jurisdiction must be found in the Constitution of the United States or the State of Nevada, a federal or state statute conferring such jurisdiction, some authoritative case law, or at least a good substantive reason to extend the common law. The Tribe's brief filed March 5, 1974, (if the cases and assertions are read carefully), provides no basis to extend parens into these very tenuous areas.

C. As set forth in the State's opening brief, the parens status is not something that can be imposed on the State without its approval, except in an interstate adjudication of waters or a boundary dispute, or some other dispute between states.

As pointed out in the State's opening brief, there are many cases where the states sued as plaintiff in parens, but none found where the State was sued as defendant in parens, subject only to the foregoing exception.

The cases cited by the Tribe on page 2 of the March 13 brief at lines 7-10 are all cases involving suits between states involving interstate waters. In those cases, the

states are treated as sovereigns and subject to the original jurisdiction of the U.S. Supreme Court. The instant is not between states and does not involve interstate water rights.

D. The Tribe endeavors to confuse the issues by casting the United States as a sovereign in the same role as the State plays in equitable apportionment cases on interstate streams. While there are countless cases involving the settlement by Courts of water rights between states on a basis of equitable apportionment of interstate streams, there is no authority for casting the United States in a role of a state so that the United States would receive an apportionment of a stream and a state the balance.

The Tribe, in its argument, uses the term "allocation" as contrasted with the term "apportionment" used in *interstate* equitable apportionment cases. This term "allocation" must be taken apparently to refer to the same sort of equitable apportionment which a state receives along with another state in a judically settled apportionment of an interstate stream or in a compact between states which equitably apportions an interstate stream between states.

E. Let us then examine the characteristics of a state versus state case, or compacts which divide the waters of an interstate stream on an equitable apportionment (or allocation) basis.

In some cases where the states have the same system of water law then relative priorities in date of appropriation have been applied to all users on the interstate stream. *Wyoming v. Colorado*, 259 U.S. 419, 66 L. Ed. 999, 42 S. Ct. 552.

Where the water laws of the contesting states vary as in the case between Nevada and California, for example, then, in making the apportionment, each of the states has been treated by the Federal Courts in the manner of a

sovereign nation, and taking into account the equities, the Federal Courts have apportioned or allocated specific amounts of waters between the states. Generally, in such cases, there is no priority fixed as between the states. Each of the states receives an absolute share of the stream determined in annual acre feet or some other manner. Waters are then divided within the states for all uses, including Federal uses within that state, according to the laws of each respective state, and so far as Federal uses (not appropriated according to state law) are concerned by application of federal statutory law or federal common law which may apply to the rights used for Federal purposes. In apportioning or allocating water between the states in an interstate water apportionment case, where the water laws of the states involved vary, there are no priorities for individual users (federal or private) within the individual states; no points of diversion are established; no places of use are established; the type of use is not governed; and the works of diversion are not usually adjudged or settled.

The manner of apportionment (or allocation) of the waters in states versus state cases such as *Arizona v. California*, supra, is in the same manner as if the water was being divided between the United States and Mexico or the United States and Canada. In *Arizona v. California*, Federal uses within states are taken from the respective shares allocated to each state.

The nature of the right which the United States has on an interstate stream is like any other individual user's water right in that State, except for some special characteristics affixed by Federal law.

Water rights in the states using the law of appropriation generally have the following characteristics once they are settled by judicial or administrative proceedings:

(a) Priority;

(b) Amount;

(c) Points of diversion;

(d) Place of use;

(e) Works of diversion and means of conveyance to place of use;

(f) Type of use.

Federal rights on an interstate stream have all of these exact same characteristics and are determined so far as Nevada is concerned in the same manner as the rights of other individual users on the stream, except as modified to some extent, as follows:

(i) The *priority date* of a particular Federal water right in relation to the other users on the stream is the date when the particular land in question was withdrawn for the particular Federal use intended. The rights of individual state water users, so far as priority dates are concerned, would generaly depend upon when the work of diverting the water was commenced (as to a so-called vested right), or the date of filing an application to divert the waters with the State Engineer so far as the water obtained under state administrative proceedings. Nevertheless, there is a fixed priority date for the Federal rights, as well as the rights of other individual water users on the same stream, and this priority date, when contrasted with the flow of water in the river or stream at a particular time, will determine if there is any water available from the source which may be diverted to satisfy the particular right, whether it be for a Federal use or an individual use. The Federal right takes its place in priority and if there are senior individual rights to the Federal rights as there are on the Truckee River, for example, (*U.S. v. Orr Ditch, In Equity A-3*, In the United States District Court, for the District of Nevada), then unless the stream flows sufficiently to satisfy the prior individual rights, there are no waters diverted for the Federal rights. Fed-

eral rights may be of varying priorities interspersed with junior or senior individual private rights. These characteristics of Federal rights so far as priorities are concerned are exactly the same as individual rights.

(ii) In Nevada, the extent or *amount of water attributable to a particular individual private water right* essentially depends on the actual beneficial use of the water which is finally achieved by the user. On the other hand, a Federal Winters Right (*Winters v. U.S., 207 U.S. 564 (1907)*), may depend on a potential or the amount of water which might reasonably be diverted for the particular use for which the reservation of Federal land was made. Nevertheless, both the Federal right and the right of other individual private users have a fixed amount attributed to them by the judgment of the Court or administrative proceedings that may be applicable in adjudicating the water rights for the stream.

(iii) In all other respects, Federal water rights have the same characteristics as the rights of other individual private users on the stream. The Federal rights are not absolute in the sense of the rights which a state would have according to its allocation in interstate stream apportionment cases.

In the present proceedings, all of these characteristics of the claimed Federal rights will have to be determined.

It should also be noted that in this case, as in the case of most Winters Rights cases, the United States is not, so far as the Pyramid Lake claims are concerned, acting as a sovereign in bringing the case, but rather is acting as a fiduciary or trustee for its Ward, the Indian Tribe. The United States is everyone's sovereign, wherever they may live and however their lots may be cast. The United States is not a sovereign for any particular group of citizens. (*Minnesota v. Benson, 274 F. 2d 764, Court of Appeals, D.C., 1960*). Each of the states on the other

hand is a sovereign for all of those citizens who live within the borders of that particular state. While some of the Federal uses sought in this case are for non-Indian purposes (as contrasted with the Government's role in representing the Indians as its Wards), these other Federal rights sought will all have the characteristics of all individual private water rights on the stream with the qualifications mentioned above.

There are no cases and there is no authority for setting aside of Federal uses as opposed to state uses within the boundaries of the State in the manner of an equitable apportionment or, as the Tribe characterizes it, of the "allocation of the water of the stream". This is simply not the way it has been done and there is no reason in this case to depart from past practices. Past Winters cases brought by the United States (which probably number in the thousands all over the West) have been of the nature of the Orr Ditch case (and the present posture of this case) against individual private water users and have not cast the State in a parens position so as to sue the State only on that basis and to keep the individuals out. Past Winters cases have not been of the nature of general quiet title suits.

The United States might divide the Colorado River, for example, as a matter of a treaty or adjudication by an International Court, much in the same fashion as the states divide interstate waters through judicial proceedings or compact. Each of the parties involved in each of these situations is in a true sense a sovereign, representing all of the citizens within its boundaries, whether within the United States and Mexico, respectively, or within the boundaries of two sovereign states of the United States. There is no authority, however, for the division of waters between the United States as a sovereign and one of its individual states on the other hand.

The Tribe endeavors to draw a distinction between the case of the sort now before the Court and what it charac-

terizes as a general stream adjudication. The Tribe attempts to find some solace there. However, the Tribe cites no authority which would draw any distinction of this sort that would make any difference in this case.

In the first place, it should be noted that the adjudication in *U.S. v. Orr Water Ditch*, supra, on the Truckee River, was a widespread adjudication, naming many individual defendants, but that it was not a general adjudication. There were a number of persons claiming rights who were not named as parties. Individual water rights owned by these persons in the areas, such as Washoe Lake and Steamboat Creek (tributaries to the Truckee River), were not adjudicated in the Orr Ditch Case. Further, we assume that the present case on the Truckee River will take into account (as it does for certain Federal rights with junior priorities as alleged in the Plaintiff's Complaint) water rights granted by permit from the State Engineer of Nevada, subsequent to entry of the decree.

We must then perhaps seek to define what is meant by an adjudication. An adjudication is not more than a judgment as to a water right. Adjudications take into account the characteristics of water rights of both Federal and non-Federal uses as set forth in Paragraphs (a) to (f) hereinabove. An adjudication may be made as to only a single right or as to several rights on a stream, or may be in the nature of a general quiet title suit as to all rights on a stream.

If there is more than one right on a stream, then, of course, the determination of each right, both Federal and non-Federal, is relative to all other rights on the stream, and whether a particular water right will be satisfied in any particular year or at any particular time will depend upon, particularly, the priority date, amount of water of the individual right, and the amount of water in the source, but it may also depend on the other characteristics of water rights mentioned above, which can

affect such things as return flows, recharge of ground waters and all of the other characteristics of the water rights mentioned in Paragraphs (a) to (f) hereinabove.

All rights, both Federal and non-Federal, are correlative or relate to all of the other rights on the stream. The adjudication then simply is a determination of the water rights of certain or all of the water rights on a stream in relation to all of the other rights. Neither the statutes nor the applicable cases, however, draw any distinction between general adjudications or adjudications of specific rights, or provide any authority to claim that because this is not a general adjudication, we may conclude that it may be treated as an equitable apportionment case between the United States and one of its states. The fact of whether there are a large number of rights adjudicated in a case or a few number of rights, or only one, doesn't change the nature of what is in essence a quiet title suit to determine who has what property rights in these waters as opposed to the other claimants or owners in the stream.

When a Court enters into the area of adjudicating water rights, frequently it will find that many rights on the stream have been settled by previous Court actions or administrative proceedings through the State Engineer's Office. The fact that a number of rights are recognized and are not going to be tampered with so far as they relate to each other doesn't change the basic characteristics of this case. The claimed Federal rights have various points of diversion, places of use, priority dates and claimed amounts of water, interspersed with nearly all of the rights on the stream.

This case, whether you call it an allocation case or characterize it by any other name, is an "adjudication" of relative water rights on this stream. All water rights in Nevada are relative to each other and depend upon the characteristics mentioned above and are affected by every

right on the stream, particularly as to priority date, but also to a great extent as to the amount adjudicated as to such rights, the place and manner of use and the point of diversion.

In the instant case the alleged Federal rights must have all of the characteristics mentioned above determined and adjudicated in relation to the other rights of named defendants on the stream.

A rose by any other name is still a rose and this present case is a case for adjudication of water rights of the Truckee River that affects every other right on the stream. Hence, it does affect individual property rights of people who have been or are being served in the case and there is no need to try to cast the State of Nevada in a capacity of parens patriae for any individual property owner by trying to draw some sort of distinction between adjudication and a phantom defined as "allocation". While Orr Ditch rights are inviolate in the view of the United States, we do not now know how even the Tribe will react to the many rights not included in the Orr Ditch Decree senior to the claimed additional rights for the Tribe.

The various Federal rights which are claimed with differing points of diversion, places and types of use, and possibilities of return flow may each affect all of the different users of Truckee River waters in different ways. This is an added reason why each individual claimant should have an opportunity to be heard so that those circumstances which apply particularly to him may be presented to the Court. Specific circumstances that apply to specific Federal rights and those private rights that are affected by the exercise of the Federal rights will exist in each factual situation. This necessitates that each of the private users, as an individual, be given a day in Court so that his particular conditions and position may be understood and ascertained by the Court and taken into consideration in the final Decree.

III. CONCLUSION

A. The law of the case and guidance for our Court is set down in *U.S. v. Nevada and California*. The case to this juncture has followed that pattern.

B. One of the basic problems at this juncture in the consideration of this Motion is what the Tribe and the United States are actually seeking. If, as we have presumed, it is for the State to be cast in a parens role in respect to persons who have been served but do not choose to appear and defend or persons who cannot be served, then the issue is considerably narrowed and we are not faced with nearly as difficult a problem as there would be if there were an effort to apply parens to all non-Federal uses in Nevada. The foregoing brief, we think, very specifically answers questions that would be raised in considering the narrowed areas of concern aforementioned which now appear to represent the thrust of the briefs filed by the United States and the Tribe.

C. There is no point in borrowing trouble about the management of the case. While there are many defendants, proceedings to this point do not indicate that problems of management of the case would be a legitimate reason to take away valid legal rights, by substituting the State in parens for individual property owners as defendants. The United States, on urging of the Tribe, has again initiated the relitigation of Truckee River water rights. These defendants did not cause the difficulty. Each of them is entitled to be heard in his own right. Conduct of the case to the present indicates it is being and can be tried in an orderly manner, without changing the present concept of the case or depriving any individual of his status and rights as a party defendant.

D. The Motion of the State of Nevada to Dismiss it as a defendant in parens for its citizens should be granted.

Dated: October 4, 1974.

Respectfully submitted,

ROBERT LIST
Attorney General of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney General
EDWARD C. REED, JR.
Special Deputy Attorney General

By: /s/ Edward C. Reed, Jr.
EDWARD C. REED, JR.
Special Deputy Attorney General

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiffs-Intervenors,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

MEMORANDUM DECISION

At the hearing on all pending motions held on October 8, 1974, the Court directed that counsel for the respective parties should meet and attempt to agree on procedures and related matters regarding the progress of this action, with particular attention to be given to the need for and scope of a bifurcated trial under Rule 42(b) F.R.C.P. on the defense of res judicata or collateral estoppel and related defenses and briefing of the class action issue which was raised at the hearing.

Following the hearing counsel met and on October 23, 1974, the Court entered an Order which provided for the submission of briefs on the class action issue and the bifurcated trial issue and providing for further oral argument on the question of the scope of a separate or bifurcated trial, and for further oral agrument on the motion to dismiss the State of Nevada in its parens

patriae capacity. This memorandum and the accompanying Order address themselves to the bifurcation and class action issues and depart somewhat from the Court's October 23, 1974, Order in that it seems unnecessary to hear further oral argument on the question of the scope of the initial separate trial.

BIFURCATED TRIAL

The varied positions of the parties on the need for and scope of an initial bifurcated trial under Rule 42(b) F.R.C.P. will not be repeated here. The Court has reviewed the arguments and is still of the opinion that a separate trial on the affirmative defenses of res judicata and collateral estoppel would be the most convenient and expeditious means of disposing of those questions. At the same time, however, it would be highly improper to determine today what evidentiary matters are or are not relevant or material in the proof or disproof of those defenses. These questions must naturally be taken up at the separate trial.

The scope of the separate trial therefore becomes self-evident. Counsel for the respective parties, no doubt, know that each element of the res judicata and/or the collateral estoppel defenses must be affirmatively proved and that the defendants carry the initial burden.

The Court rejects the position taken by the United States and the Tribe that an initial separate trial should also include a determination of the validity or merits of the claims to water rights which they assert. The validity or merit of a cause of action need not be known if the question is whether the cause of action is barred by the principles of res judicata or a party is collaterally estopped from asserting matters in proof of its validity. The Court does agree that in order to consider the applicability of the principles of res judicata or collateral estoppel, the nature of the cause of action must be known.

However, this can be determined from the complaint and through discovery so that a sufficient record is made to determine if the principles of res judicata and collateral estoppel apply.

Accordingly, the Court is of the opinion that following a wave of discovery, this matter could stand submitted after a one-week trial followed by the submission of post trial briefs. However, the Court's estimate of time, like counsel's, is not always accurate.

Discovery should commence forthwith. Presumably, there would be discovery motions which would require the Court's attention. These matters can be taken up at Boise, Idaho, on very short notice between the parties involved if oral argument is necessary. In this regard, the parties are requested to comply fully with the time requirement under the federal discovery rules and if motions are required, to submit briefs on the pertinent issues for the convenience of the Court and the other parties.

Further oral argument on the motion to dismiss the State of Nevada in its parens patriae capacity can be heard immediately preceding or following the separate trial. However, it should be pointed out that the Court has received briefs on the motion. Therefore, if counsel for the interested parties do not wish to make further oral argument on the motion or wish the matter to stand submitted on the briefs already received or following additional briefs, they should so advise the Court by written stipulation.

CLASS ACTION

The State of Nevada and Sierra Pacific Power Co. moved to dismiss this action for failure by the United States to join as parties defendant two groups of water users: Certain named "Truckee River Permittees" and the holders of water right certificates or other contracts for water between the landowner and the United States or the Truckee-Carson Irrigation District (TCID), on

the Newlands Reclamation Project. The United States did not oppose joinder of these two groups and moved to amend its complaint to join as defendants the individual "Truckee River Permittees" and to join as a class under Rule 23(a) and (b)(1) F.R.C.P. those individuals who are holders of water right certificates on the Newlands Reclamation Project and who are members of the TCID, naming as representatives the TCID and seven water right certificate holders who are members of the class. The motion to amend thus mooted the motion to dismiss and this Court so ruled. However, it became apparent at the October 8th hearing that certain existing defendants opposed joinder of the Newlands Project certificate holders as a class, rather than individually. The Court therefore called for briefs on the issue and has been given the benefit of the thoughts of the State of Nevada, the TCID and the United States.

The State of Nevada and the TCID have raised numerous points in opposition to joinder of the certificate holders on the Newlands Project as a class. Many are disposed of by a discussion of the prerequisites to a finding of proper joinder of a class. However, one point raised by the TCID warrants some discussion.

I.

The TCID contends that each certificate holder or member of the class has a vested, appropriative water right appurtenant to the land described in each certificate. See *Ickes v. Fox*, 300 U.S. 82, 94-95, 81 L. Ed. 525, 530-31, 57 S. Ct. 412 (1937) and *Nebraska v. Wyoming*, 325 U.S. 589, 611-16, 89 L. Ed. 1815, 1828-30, 65 S. Ct. 1332 (1944). It contends that by their nature, appropriative rights are not amenable to class litigation. The United States argues that regardless of the legal nature of the certificate holders' rights, their rights for the purposes of this action are identical and fixed inter se. Therefore, treatment of the certificate holders as a class is permissible.

Generally, where appropriative water rights are involved in a general stream adjudication, each individual appropriator must be brought before the court. See *State v. Rank*, 293 F.2d 340 (9th Cir., 1961), rehearing denied 307 F.2d 96 (9th Cir., 1962), aff'd. in part, rev'd. in part, *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963) and *City of Fresno v. State of California*, 372 U.S. 627, 83 S. Ct. 996, 10 L. Ed. 2d 28 (1963); *Miller v. Jennings*, 243 F.2d 157 (5th Cir., 1957); *People of State of California v. United States*, 235 F. 2d 647 (9th Cir., 1956). However, these cases are distinguishable from the circumstances presented here. All parties to this case concede this is not a general stream adjudication and not a fight among all appropriators on the stream to establish their rights. Much of what is said in the foregoing cases concerning class actions to adjudicate water rights is, therefore, upon careful reading, supportive of the efforts of the United States to join the certificate holders as a class.

In *Rank*, the Court of Appeals was concerned with whether the United States had been properly joined as a defendant under the McCarran Amendment, 43 U.S.C. § 666, as it could only be joined as a defendant if the litigation could be classified as a general stream adjudication. Because the action had been brought as a class action, not all claimants in the stream were parties and the District Court had not decreed rights as between the individual claimants. Therefore, the Court held that since the action was not a general stream adjudication, the United States could not be joined as a defendant.[1]

[1] This was also the holding in *Miller v. Jennings*, supra. The action there was an attempted general stream adjudication by use of the class action device. The Court disagreed, holding that the suit was not a suit to establish all rights on the river because not all claimants were before the Court and therefore the action had to be dismissed as the United States was an indispensable party and had not consented to be sued. In *State of California v. United States*, supra, the Court condemned a partial declaratory judgment,

It is important to note that the Court did not dismiss the action saying that it could not be brought as a class action.

The District Court in *Rank* concluded from facts very similar to those presented here that the action could proceed as a class action. In *Rank v. (Krug)*, 142 F. Supp. 1 (D.C. Cal. 1956), the court stated:

> "Although it has been stated many times, it is again necessary to repeat, that this suit is not a case where the water users, either riparian or overlying, are seeking to enforce any separate or several rights as among themselves or against one another, or to have any given amount of water declared and adjudicated to be the right for use on a specified tract of land. As the Complaint was predicated, the Pre-trial Order was framed, and the case tried, upon the basis that the character of the right sought to be enforced is a common right to water from a common source of supply, namely, the San Joaquin river, and that there was but one act of taking that common source of supply, viz: the impoundment and diversion of the water back of Friant dam. 142 F. Supp. at 155.
>
> Where, as here, there is a common source of supply to the owners of all rights, and that common source is invaded or threatened, there is no reason in law or logic why any one or another nature of right cannot stand in judgment for all others, whether riparian, overlying, appropriative, or prescriptive, in a class action to protect that source of supply which is common to all of them. As to the common source and the common act of invasion of that source, their

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ostensibly only declaring rights between the United States and two claimants, but which in effect bound all of the other claimants who were parties in the case without giving them an opportunity to be heard. The Court stated that the only proper way to adjudicate rights was to have all the claimants before the Court, which had not been done.

> interests are identical—although as between themselves they may be different in amount, or different in quality, i.e., prescriptive, appropriative or the like. 142 F. Supp. at 159."

In this action all of the certificate holders derive their rights from a common source of supply; the diversion by the United States of a quantity of water for use on the Newlands Project. See *United States v. Orr Water Ditch Co.*, et al, Equity No. A3, Final Decree dated September 8, 1944, at pgs. 10-11. The United States and the Tribe seek to diminish that source of supply which would in turn diminish the water rights of all members of the class. As against the efforts of the United States and the Tribe to reduce that common source of supply, the interests of each member of the class are identical in both fact and law.

Nor has it been shown that any certificate holder could or would be in a position to establish in himself a superior right to water from that common source of supply as against any other certificate holder. Each certificate holder's right is fixed under the terms of his contract with the TCID.[2] Under the terms and conditions of the

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[2] The TCID has exhibited five differing types of contracts which have been used to establish water rights on the Newlands Project over the 60-year period since its construction. Two of the forms, Exhibits A & B, provide for an exchange of a vested water right by the landowner in return for the right to use project water. These forms are contracts between the United States and the landowner and provide for a definite amount of water stated in acre feet which the landowner is allowed to divert from the Carson River. Exhibit C is the form of contract which has by and large been used for obtaining water rights on the Newlands Project. It is a form between the TCID and the landowner and gives the landowner a water right in that amount which may be beneficially applied in accordance with good usage in the irrigation of the land, provided that in times of shortage, the amount of water to be furnished will be a proportionate share of the water available. The other two forms, Exhibits D & E, appear to be predecessors of Exhibit C and are between the landowner and the Newlands Project Engi-

contracts, if the United States and the Tribe were successful, it appears each certificate holder would be affected equally by a proportionate quantitative reduction of their water rights. This is not true of the other individual defendants already joined. Each individual defendant has a water right with a priority date which could be applied to defeat another's right which is junior. Thus, the rights of each certificate holder, even though characterized as appropriative, are identical with the rights of the other certificate holders as against the United States and the Tribe and those rights are fixed inter se. Reason and logic render their rights appropriate to class adjudication if the prerequisites under Rule 23 are satisfied.

II.

Before there can be a class action or a group can be proceeded against as a class, the group must in fact constitute a class and those joined in the action as representative defendants must be members of the class. The Court finds that the Newlands Project certificate holders who are members of the TCID do constitute a class. All certificate holders on the project have a common claim and interest in the waters diverted for use on the project and membership in the class is further defined by membership in the TCID.

The seven individuals sought to be joined as representative defendants of the class are in fact members of the class. See Exhibit "1" attached to State of Nevada's

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neer. They are substantially the same as Exhibit C and were probably used until the TCID was formed.

There is no indication of what effect, if any, the different types of contracts would have on any rights between the certificate holders themselves. It is doubtful that any one type of contract or certificate could be a basis for establishing a superior right to Newlands Project water as against other members of the class. Nor is it indicated how many members of the proposed class, if any, claim rights under an agreement other than Exhibit C.

Motion to Dismiss for Failure to Join Indispensable Parties, filed August 14, 1974. Although the TCID is not technically a member of the class inasmuch as it is the organization composed of the members of the class, it is nonetheless an appropriate representative. The TCID is already a defendant in this action and exists for the purpose of representing its members and protecting or asserting their common interests. See *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2nd Cir. 1968); 7 Wright and Miller, Federal Practice and Procedure, p. 589 (1972).

The Court finds that "The class is so numerous that joinder of all members is impracticable." Rule 23(a)(1) F.R.C.P. There are approximately 3800 members of the class. While this number is not so startling when compared to the some 13,000 individual defendants already joined, it is still a self-evidently large class when considered by itself. It would be difficult and inconvenient to join all members of the class as it would take an additional six to twelve months to serve each member in the traditional manner. This would necessarily involve considerable additional expense to the United States and the Tribe, even though all members are within a relatively small area and all within the Court's immediate jurisdiction. Joinder of each certificate holder individually would also be inconvenient to the members of the class. Individual claims would be quite small in comparison to the amount of money and time which would be required to participate in this litigation. Joinder need not be impossible, only difficult and inconvenient. *Harris v. Palm Springs Alpine Estates*, 329 F.2d 909, 913-14 (9th Cir. 1964).

The Court finds that there are both questions of law and fact common to the class. Rule 23(a)(2), F.R.C.P. As against the United States and the Tribe the defenses of each member of the class would be identical and there would be no claims of any one member which would be

adverse to any other member. "[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3), F.R.C.P. The claims or defenses of the TCID would also be identical with the members of the class.

"[T]he representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4), F.R.C.P. Adequacy of representation is a question of fact. *Harris v. Palm Springs Alpine Estates*, supra. It would seem there could be no better representative of the class than the TCID which was formed for just such a purpose. Although it has opposed the use of the class action device, counsel for the TCID have indicated that it will gladly represent the class. The seven individual members were not picked at random. They are the current directors of the TCID duly elected by members of the class. As such they have more than a passing interest in this litigation. The TCID has already taken a very active role in this case and will, no doubt, continue to do so. It would appear there would be a great deal of communication between the TCID, the seven individual representatives and the members of the class and that all will be most ably represented.

Turning to subsection (b) of Rule 23, the United States contends that the Newlands Project certificate holders may be proceeded against as a class under the standards of (b)(1)(A) or (b)(1)(B).[3] If either is applicable, a class action is proper.

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[3] "(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the

Obviously, if the United States could not join the certificate holders as a class, it and the Tribe would be forced to join them individually and establish the rights which they seek as against each. As a matter of practical necessity, the United States and the Tribe would be forced to act and litigate in the same manner against individual certificate holders as it would toward the certificate holders as a class. See 7A Wright and Miller, Federal Practice and Procedure, p. 11. This would then create a risk of inconsistent or varying adjudications of the rights of each individual certificate holder which, when considered together, could impair the uniform course of conduct which the Tribe and the United States seek to pursue; that is, to establish water rights, some of which they contend are prior to the rights of certificate holders. The standards of subsection (b)(1)(A) are met.[5]

Probably the most appealing argument for joining the certificate holders as a class is one of sheer practicality. Treating the certificate holders as a class provides "a ready and fair means of unitary adjudication"

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interests of the other members not parties to the adjudications or substantially impair their interest; . . .

. . ."

[4] It should also be noted that in its comments concerning Rule 23(b)(1)(A) the Advisory Committee cites with approval *Rank v. (Krug), supra.* Notes of Advisory Committee on Rules, 39 F.R.D. 69, 100.

[5] The only basis which the government sets forth for proceeding against the certificate holders as a class under subsection (b)(1)(B) seems to be that adjudication of a few of the certificate holders' rights as against the United States and the Tribe would as a practical matter be dispositive of the others' interests by stare decisis. If the Court correctly understands the argument, it is not well taken. The stare decisis consequences of one or a few adjudications of certificate holders' rights cannot supply the practical disposition of all other rights of the class. *LaMar v. H & B Novelty and Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973).

of the rights of the United States and the Tribe and the certificate holders. Note of Advisory Committee on Rules, 39 F.R.D. 69, 100. If each certificate holder were joined individually, in all likelihood, only a handful would appear and be represented due to the time and expense involved, yet all who were joined would be bound. The same result can be achieved by joinder of the class, but with considerable savings of time and money. Each member of the class will be bound by any final decision under Rule 23(c)(3), but all will be ably represented, not just a few. However, if any member of the class desires to participate in the case through his own counsel or pro per he will be given that opportunity.[6] An appropriate Order giving effect to the Court's findings herein follows this Memorandum.

III.

Rule 23(d)(2) sets forth the requirement of notice to some or all members of the class when the action is brought as a (b)(1)(A) type class action.

> "(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . .
>
> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims

[6] It should be kept in mind that if it becomes apparent during the course of these proceedings and prior to a decision on the merits that joinder of the certificate holders as a class was improper or that they should not be treated as a class, the Court has the power to alter or amend this Order according to Rule 23(c)(1), F.R.C.P.

or defenses, or otherwise to come into the action."

. . . .

23(d)(2), of course, does not provide for a specific manner of notice or the form of the notice. These are matters left to the court's discretion to be dictated by the circumstances of each case. Any notice must, of course, comport with due process, but this does not mean that personal service of the filing of a class action against the certificate holders must be made. In this regard the recent United States Supreme Court case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, —— L.Ed.2d —— (1974), provides the needed guidance.

Although the court in *Eisen* was concerned only with a Rule 23(b)(3)-type class action and the type of notice required by Rule 23(c)(2) and expressly stated that the decision did not apply to the notice required in cases brought under subdivisions (b)(1) and (b)(2) (See *Eisen*, supra, n. 14), it is at least authority that individual notice by mail, as was held required, to all prospective class members in a (b)(1) or (b)(2) class action would certainly be sufficient in light of the discretionary language of Rule 23(d)(2). Such notice would comply with the requirements of due process. See *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Since the United States has indicated its desire to provide each prospective class member with notice by mail, the Court finds that it shall be given. A form of notice to be mailed is attached. The cost of providing notice to each class member must be borne by the United States and the Tribe equally and such procedure shall commence forthwith. The TCID and the State Water Engineer will cooperate fully in furnishing the names and addresses of all class members.

The Court is of the opinion that publication of notice, as well as notice by mail, would be duplicitous and serve

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no purpose. This action is already widely publicized in and around the Truckee River drainage. Notice of the initiation of the action has already been published, although it did not relate specifically to certificate holders. Any class member who, through absence or inadvertence, does not know of the pendency of the action will be so informed by the mailing procedure.

Dated this 5th day of February, 1975.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge
Sitting by Assignment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

ORDER

The Court having considered the arguments of the various parties on the questions now pending for decision and pursuant to the Memorandum filed simultaneously herewith, and good cause appearing;

IT IS THEREFORE ORDERED as follows:

1. That pursuant to Rule 42(b), F.R.C.P., this matter be set for trial before the Court on the affirmative defenses of res judicata and collateral estoppel, said trial to commence on the 21st day of April, 1975, at 9:30 A.M. in Reno, Nevada;

2. Pre-trial discovery under the Federal Rules of Civil Procedure as to the issues above named shall commence forthwith;

3. Further oral argument on the motion to dismiss the State of Nevada in its parens patriae capacity shall be heard, either prior to or immediately after said trial,

unless, by written stipulation the interested parties agree that the matter may be submitted to the Court without oral argument and upon the briefs already submitted or after the receipt of further briefs. In the event the interested parties stipulate to forego any further oral argument on the matter and desire to submit additional briefs, said briefs shall be filed simultaneously within ten (10) days of the filing date of said stipulation with any reply briefs to be filed within ten (10) days thereafter.

4. The motion of the United States of America to amend its complaint to join as defendants Marvin Weishaupt, Charles Frey, Ray Nygren, David Andrulli, Earl Harriman, Joe Serpa, Jr. and Richard S. Lattin, individually and as representatives of that class of persons who are holders of water right certificates on the Newlands Reclamation Project, and who are members of the Truckee-Carson Irrigation District and the Truckee-Carson Irrigation District as a representative of said class, and to join as defendants that class of persons who are holders of water right certificates on the Newlands Reclamation Project and who are members of the Truckee-Carson Irrigation District, is GRANTED.

4. That personal service of process upon the individuals named in Paragraph 3 above and the mailing of notice to all members of the class of persons above described by first class mail to their last-known address shall commence forthwith.

Dated this 5th day of February, 1975.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge
Sitting by Assignment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

ORDER GRANTING MOTION TO DISMISS

Defendant, STATE OF NEVADA, on August 15, 1974, filed herein a Motion to Dismiss this action against it insofar as it has been sued as parens patriae for its citizens. The basis for said Motion is that the Complaint fails to state a claim upon which relief can be granted.

Paragraph II of the Complaint herein states: "The State of Nevada is named as a party defendant in this action in its proprietary capacity, in its governmental capacity as the issuer of permits to appropriate unappropriated waters, and as *parens patriae* for its citizens". The State's Motion to Dismiss has been directed solely at its being named as party Defendant in the capacity of parens patriae for its citizens, and this Order Granting Motion to Dismiss applies only to the action against the State in said capacity.

In deciding this Motion, the Court has had before it the pleadings on file and memoranda of points and authorities setting forth the legal arguments both in support of and opposed to the granting of the motion. In addition, a full hearing on the Motion was held in open Court on April

21, 1975, so that the Court feels the issue has been fully presented.

Basically, this is a quiet title action. It is apparent there are competing and conflicting interests among various citizens of Nevada, including the Indians of the Pyramid Lake Paiute Tribe and the people of the Newlands Project, and the State itself. Under such circumstances, it would be improper for the State to be required to act as parens patriae for its citizens.

The questions of who should be served with process and the manner of such service hinge, in part, on whether the State of Nevada is a party defendant as parens patriae for its citizens. It is axiomatic that the earliest possible final determination of this issue should facilitate the final disposition of the entire case. Therefore, the Court expressly determines that there is no just reason for delay in entering a final judgment dismissing the action against the State as parens patriae for its citizens.

There is no possible way the Complaint could be amended to afford relief against the State as parens patriae for its citizens.

THEREFORE, IT IS HEREBY ORDERED that defendant, State of Nevada's Motion to Dismiss the action against it insofar as it has been sued as parens patriae for its citizens be granted, without leave to amend the Complaint herein.

IT IS FURTHER ORDERED that a final judgment granting the State's Motion be entered in accordance with the requirements of Rule 54(b), Fed. R. Civ. P.

Dated: April 29, 1975.

/s/ J. Blaine Anderson
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

JUDGMENT OF DISMISSAL

In accordance with the provisions of the Order Granting Motion to Dismiss this day granted herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action against the STATE OF NEVADA IN ITS CAPACITY AS PARENS PATRIAE FOR ITS CITIZENS, and only in said capacity, be and the same hereby is, dismissed without leave for the plaintiff to amend its Complaint.

IT IS FURTHER ORDERED that the Rule 54(b) Certificate attached hereto be deemed incorporated into this Judgment of Dismissal by this reference thereto.

Dated: April 29, 1975.

/s/ J. Blaine Anderson
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

RULE 54(b) CERTIFICATE

With respect to the issue determined by the Judgment of Dismissal to which this Certificate is attached, in accordance with Rule 54(b), Fed. R. Civ. P.,

IT IS CERTIFIED:

(1) That the Court has expressly directed the entry of final judgment on the motion to dismiss the action against defendant, State of Nevada, in its capacity as parens patriae for its citizens.

(2) That the Court has expressly determined that there is no just reason for delay.

Dated: April 29, 1975.

/s/ J. Blaine Anderson
U.S. District Judge

Robert S. Pelcyger
John E. Echohawk
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

PLAINTIFF-INTERVENOR'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO STRIKE OR, IN THE ALTERNATIVE FOR AN EARLY DETERMINATION OF A SPECIAL LEGAL QUESTION

By order dated April 29, 1975, filed on May 2, 1975, the Court granted the defendant State of Nevada's motion to dismiss this action against it insofar as it has been sued in its parens patriae capacity for its citizens.

In *People of the State of California v. United States*, 180 F.2d 596 (9th Cir. 1950), *cert. denied*, 340 U.S. 826, the Ninth Circuit held that the State of California was entitled to intervene as of right in its parens patriae capacity in a water suit brought by the United States against a California water user. In so doing, the court was at pains to distinguish between the interests of an individual water user and the interests of a state acting in its parens patriae capacity. Paraphrasing California's pleadings, the opinion states:

> It is alleged in the answer of the State that the use of the diverted water by the Water Company is for irrigation purposes upon lands of the stockholders of the Water Company (a mutual company), and "after such use it becomes available for and is used upon a large acreage of land in Sierra Valley," which latter acreage belongs to landowners who are not members of the Water Company and cannot be represented by it and are not parties to the action; that the lands of Water Company landowners and of such non-party landowners constitute nearly one-half of the irrigated lands within the applicable Watermaster Service Area set up under the State Water Code; that the State has no other source of water to substitute for the water in suit; that the loss of the water involved would put such an amount of land out of production as to seriously affect a California population of 15,000 people *and the economy of two counties of the State of California and their tax structure*, as well as the dairying industries and other businesses and establishments located in six towns within the area, the success of which is dependent upon successful agriculture in Sierra Valley, which is basically dependent upon the water in suit. And further; that such loss of water would so seriously affect the State Watermaster service as to make the cost prohibitive to maintain that service for such lands as might be able to obtain any water within

> the Watermaster area. It is further alleged that after such use by the Water Company and other landowners in Sierra Valley, about 60% of the water in suit enters the headwaters of the Feather River System and is used in that System entirely within the State of California. *All these matters are alleged to be of public interest and State concern, and, that it is the right, if not the duty, of the State, under the above-mentioned requirements of the Constitution and laws of the State of California, to protect them in this litigation as they are necessarily involved in any decree which might award the plaintiff the relief asked for in the complaint, or any relief, and, that the Water Company can only assert in court the rights of its shareholders and cannot adequately protect the State's interest in its public welfare as above described.* 180 F.2d at 599 (emphasis added).

The court concluded:

> It cannot be overlooked that the [Sierra Pacific] Power Company is a party to this suit as a cross-defendant of the [Sierra Valley] Water Company. In view of the allegations contained in the cross-complaint of the Water Company and the State's proposed answer in intervention, the State of California has, *as the proper representative of the public welfare*, a right to be heard as an intervenor between these two proposed private users of its waters, aside from all other considerations. 180 F.2d at 602 (emphasis added).

For similar expressions of the type of interest represented by the state acting in its parens patriae capacity, *see Wyoming v. Colorado*, 259 U.S. 419, 468 (1922), and *Kansas v. Colorado*, 206 U.S. 46, 99 (1907).

Nevada was sued in this action in three capacities, proprietary, governmental and parens patriae. *See* Complaint, paragraph II. Although Nevada objected to being

sued in its parens patriae capacity (Nevada's Answer, Affirmative Defense IV, pp. 20-21) and filed a motion to have this action dismissed insofar as it was sued as parens patriae for its citizens, other parts of Nevada's Answer affirmatively allege injury to the State's public welfare if the relief requested by the United States is granted. Thus, at p. 29 (lines 14-17) of its Answer, Nevada alleges:

> Meanwhile, in some low water years, water users with junior water rights would be left with no water for their homes or occupations, thereby seriously endangering the commonweal and the economy of the State of Nevada.

Similarly, at p. 30 (lines 6-10) of its Answer, Nevada alleges:

> Defendant State of Nevada alleges that if water rights for the purposes of maintaining a fishery are granted as prayed for, a severe hardship and substantial injury would befall this defendant in its proprietary capacity and also, the public as a whole.

And at p. 31 (lines 5-9):

> In this connection, the court in its discretion might enter decrees alternative to an absolute judgment for a specific amount of water to attain the objective sought, such that civilization in Western Nevada might continue to be maintained and present uses preserved.

While these allegations would have been entirely appropriate had the State participated in this action in its parens patriae capacity, plaintiff-intervenor submits that they must be abandoned or stricken now that the State, as parens patriae for its citizens, has been dismissed. The State cannot have it both ways. *People of the State of California v. United States*, *supra*, and the other authorities previously cited show that the interests Nevada

seeks to protect in the part of its Answer quoted above are not its proprietary or governmental interests, but its interests as protector of the State's general welfare that are invoked when the State appears and participates parens patriae.

This matter is ripe for determination at this stage of the proceeding. Everyone now concedes that the defendants' detrimental reliance is an essential element of their res judicata and collateral estoppel defenses.* Since the State has been dismissed in its parens patriae capacity, plaintiff-intervenor contends that the only detrimental reliance that it (as well as its co-defendants) can assert and attempt to prove at the forthcoming res judicata and collateral estoppel trial relate to its governmental and proprietary interests. The State cannot, in other words, assert or attempt to prove that the "economy of the State of Nevada" is dependent and founded upon the Orr Ditch decree, or that the citizens of the State, as opposed to the actual parties (and their successors) that were adjudicated rights in the Orr Ditch case detrimentally relied on the Orr Ditch decree.

The proper procedural vehicle for resolving this issue is a motion to strike pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, or, alternately, a motion for an early determination of special legal questions pursuant to § 1.80 of the Manual for Complex Litigation. A rule 12(f) motion is appropriate where, as here, a defense that it is not proper to raise is pleaded and an early determination would simplify the litigation and avoid needless expenditure of time and money in litigating extraneous issues. *Purex Corp. v. General Foods Corp.*, 318 F.Supp. 322, 323 (C.D. Cal. 1970); *Louisiana Sulphur Carriers, Inc. v. Gulf Resources and Chemical Corp.*, 53 F.R.D. 458 (D. Del. 1971).

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* *See, e.g.*, the State's Memorandum in Opposition to the Tribe's Motion to Compel Discovery, dated and filed April 21, 1975, at pp. 15-16.

Similarly, § 1.80 of the Manual for Complex Litigation, entitled "Early Determination of Special Legal Questions," states:

> In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the cause. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question. 1 Moore's Federal Practice, Part 2 at p. 68 (1975 Ed.)

See Tcherepnin v. Franz, 461 F.2d 544, 548-49 (7th Cir. 1972), *cert. denied*, 409 U.S. 1038.

Plaintiff-intervenor is entitled to a definitive ruling before the close of discovery as to whether the State can claim during the trial of res judicata or collateral estoppel that its economy is buttressed on the Orr Ditch decree and that all of its citizens have detrimentally relied on it. Now that the State has sought and obtained dismissal in its parens patriae capacity, there is no just or apparent reason for not resolving this issue at the earliest practicable time.

Dated: May 21, 1975

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2967 JBA

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

RESPONSE OF STATE OF NEVADA TO PLAINTIFF-INTERVENOR'S MOTION TO STRIKE OR IN THE ALTERNATIVE FOR AN EARLY DETERMINATION OF A SPECIAL LEGAL QUESTION

Defendant, STATE OF NEVADA, respectfully requests that the Court deny the Motion and rule that the State of Nevada may assert and attempt to prove injury to "the commonweal and economy of the State of Nevada" at the bifurcated trial. The State of Nevada respectfully requests oral argument on the Motion, unless the motion is to be summarily denied.

I. HISTORY OF THE PRIOR MOTION TO DISMISS THE STATE IN PARENS PATRIAE, DECIDED BY THE COURT IN ITS JUDGMENT DATED APRIL 29, 1975, DISMISSING THE STATE AS A DEFENDANT IN THAT CAPACITY.

A. *Introduction*

During the period February 27, 1974, through October 4, 1974, numerous briefs were submitted by the defendant State of Nevada, the United States and the Tribe in respect to the prior Motion of the State of Nevada.

1. In the various briefs the State of Nevada contended that it could not be sued in a capacity of parens patriae so as to bind the individual water users of the State in respect to their individual property rights. The Court in its Judgment of April 29, 1975, accepted this contention.

2. The United States and the Tribe contended that judgment could be taken against the State of Nevada which would bind some or all of the individual water users in the State, as to their individual property rights. They contended the State could stand in judgment for the individual water users of Nevada and that the individual property rights could be bound by the judgment against the State. The Court in its Judgment of April 29, 1975, rejected this contention.

B. *History of the Prior Motion by the State so far as Contentions made by the United States and the Tribe in regard thereto.*

1. The interpretation and meaning of the Complaint in regard to allegations of parens patriae so far as the Tribe and the United States were concerned was made amply clear in their briefs. The State of Nevada, according to the contentions of the United States and the Tribe, could be sued under a guise of parens patriae in a fashion

that would bind individual owners of water rights on the Truckee River, as to their individual water rights. Nowhere in their briefs did the United States or the Tribe contend that they were suing the State of Nevada in parens patriae, as to its quasi-sovereign interests (those interests held by the State itself apart from the rights of individuals, such as rights pertaining to its economy, environment and the commonweal of the State). The United States and the Tribe contended against the State in parens patriae only on the basis of quieting title against the State of Nevada as to property rights which would in turn bind the individuals who were the real parties in interest and the real owners of the subject property:

> "Thus, the State of Nevada, in its parens patriae representation of the water users on the Truckee River with rights decreed in Orr Water Ditch *stands in their place and stead as against the claims of the United States.*" (emphasis supplied) Page 5, *Response of the Tribe to Motion to Dismiss*, filed by the Tribe under date of October 1, 1974.

> "To require the State to represent water users parens patriae in this unique type of litigation provides a great opportunity for judicial economy . . . Water users not satisfied with the State's representation can appear, and most are already before the Court, thus, it is difficult to see how any interest could be prejudiced." Pages 5 and 6, *Response of the Tribe to Motion to Dismiss*, filed by the Tribe under date of October 1, 1974.

> "No claims was even made, nor to the best of our knowledge has any claim ever been made, that the Supreme Court's decree allocating Colorado River water to the five Indian reservations in Arizona v. California, 376 U.S. 340 (1964) is not binding upon all of the water users and property owners in the states that appeared in the action." Page 2, *Memo-*

randum of Points and Authorities, filed by the Tribe under date of March 13, 1974.

"That the United States can sue a State in its parens patriae capacity in the original jurisdiction of the Supreme Court to effect an allocation of water as between the State and United States is beyond question." Page 2, *Memorandum of Points and Authorities*, filed by the Tribe under date of March 1, 1974.

"Rather, the United States is seeking to establish the measure and priority of its water rights as against the water rights over which the state exercises jurisdiction. Therefore, no individual state water user has an interest in the litigation significantly different from that of the state. The interest of the state and the individual water users is identical: to minimize both the extent and priority of the federal and Indian reserved rights." Page 4, *Memorandum of Points and Authorities*, filed by the Tribe under date of March 1, 1974.

"To represent all the non-federal users in its own State insofar as the share allocated to the other State is concerned.

"A decree entered against a state will be res judicata as to individual water users within the state and individual water users are not necessary parties to allocation suits as between sovereigns." Pages 5 and 6, *Memorandum of Points and Authorities*, filed by the Tribe under date of March 1, 1974.

In its prayer, contained in the *Memorandum of Points and Authorities*, dated March 1, 1974, the Tribe summed up its interpretation of parens patriae as follows:

"There is no basis for the State of Nevada to escape or retreat from its obligation to represent those of its citizens who chose not to file an answer or an appearance." Page 9, *Memorandum of Points and Au-*

thorities, filed by the Tribe under date of March 1, 1974.

"Still less do they contain any implication that the state cannot represent in its parens patriae capacity named defendants claiming under state law who elect not to retain their own counsel." Page 9, *Memorandum of Points and Authorities*, filed by the Tribe under date of March 1, 1974.

In its briefs the Tribe is not talking about quasi-sovereign interests of the State, but only about property rights belonging to individuals. Quasi-sovereign rights are rights that do not belong to individuals, but rather inure to the State itself.

The United States in its only brief filed in respect to this matter, stated at Pages 1 and 2:

"The United States does not rely upon the State to represent in its parens patriae capacity the water users on the River upon whom it has obtained personal jurisdiction. The United States urges, however, that the State in its parens patriae capacity can and should *represent any individual not served who may claim an interest in the waters of the Truckee River.*" (emphasis supplied)

The position of the United States was also amply clear in its interpretation of what it meant in pleading parens patriae, to-wit: that it sought judgment against the State which would bind individual water users within the State of Nevada who were not served, but who might claim an interest in the waters of the river. The United States did not seek judgment against the State as to its quasi-sovereign interests.

2. These contentions of the United States and the Tribe, being pleaded in seeking a judgment against the State in parens patriae, were reiterated in oral argument before the Court on April 21, 1975.

Mr. Thorpe speaking for the United States stated:

> "After making the original service, others were brought to our attention and service has been made on them, as well as the joinder of the members of the Truckee-Carson Irrigation District as a class.
>
> "Now, as to these people, over whom this Court has personal jurisdiction, the United States would not want any recognition of parens patriae to jeopardize the jurisdiction that the Court has. However, we are concerned and we think it's a vital concern with any individuals or entities whom we might have missed and who have not been brought to our attention, as to these people we continue to urge the State of Nevada to maintain its position as parens patriae." *Transcript of Hearing April 21, 1975*, at Pages 16 and 17.

Mr. Pelcyger in presenting his oral argument to the Court on April 21, 1975, in behalf of the Tribe, stated:

> "Now, this matter is, we think, an important matter. It's important for two reasons. It's important, first of all, because there may be other interested persons. It's difficult to know exactly the reach that this case will eventually have. There may be interested persons who are not among the 14,000 who have been personally served who may eventually or conceivably assert some interest in this case or in the rights that are adjudicated in this case.
>
> "For example—and this is something, I think, we are going to get to later on—the Newlands reclamation project, the principal diverter or principal adversary of the tribe in this case obtains water from two sources: The Truckee River and the Carson River.
>
> "Historically, whatever water was not supplied from the Carson River was water taken from the Truckee

River. Well, one of the aspects of this case is that we are contending that we have a prior right to that Truckee River water and that the Newlands project is going to have to rely for its principal supply of water from the Carson River and assert its priority, the 1902 priority, to the waters of the Carson River as against the upstream users of the Carson River so that more Carson River water reaches the Newlands project.

"Nobody has served any users of water on the Carson River other than the Newlands project people. We would contend that if the state appears here to represent the citizens parens patriae, that any judgment would be binding, that any judgment declaring the existence of the rights of the tribe would be binding against all of its water users, including those on the Carson River.

"The same is true with respect to, for example, individual owners of land on the Nevada side of Lake Tahoe. They, too, have not been specifically joined, but eventually the relief in this case might ultimately affect them, and we would claim that the state's participation in parens patriae is necessary so that these water users can't eventually come into the case and say "This judgment is not binding on us, this judgment declaring that the Pyramid Lake Tribe had a right with an 1859 priority to sufficient water from the Truckee River to maintain Pyramid Lake and to maintain and preserve Truckee River and Pyramid Lake Fisheries.

"Now, it's important, I think, also to distinguish between what can and cannot be accomplished by the Parens Patriae Doctrine. I have been careful so far to indicate that the only respect in which water users who have not been served, water claimants under Nevada law, who have not been served in

this case could be bound by a judgment through the parens patriae concept is with respect to the declaratory relief that is sought in the complaint.

"But the state can stand in judgment for its water users with respect to the declaratory relief, and as to declaratory relief their interests are all in common. They have the uniform interests in opposing the rights that are being asserted here on behalf of the Pyramid Lake-Paiute Tribe of Indians. And that, as I indicated, *we would contend would be binding on anybody within the state who chose at any later time to challenge the right to the tribe or to contest in any way the validity of these rights.*" (emphasis supplied)

"Now, the parens patriae concept, I think, is also important because it's a matter of fundamental fairness of the thousands of individual defendants who have been served in this case who have not entered an appearance, who have not retained their own attorney, that they should know that their interests can be properly represented by their state, that they don't have to go out and and retain an attorney and perhaps pay that attorney more than their water rights are worth in order to have their interests in this lawsuit represented by their state. They should be able to rely on the state. They should know that they have that option." *Transcript of Hearing April 21, 1975*, Pages 20-25.

4. It is amply clear from all that can be derived from the arguments on the previous Motion, that the United States and the Tribe sought judgment against the State in a parens patriae capacity which meant against the individual users or claimants who were the real parties in interest, not against the State so far as its quasi-sovereign interest in the commonweal and economy of the State of Nevada is concerned.

C. *History of the prior Motion so far as Contentions of State of Nevada.*

1. The State of Nevada, in its Opening Brief filed under date of February 26, 1974, summarized its argument as follows at pages 1 and 2:

> "1. The State of Nevada cannot be required to appear in this case as a defendant in parens patriae. Whether or not the State of Nevada might desire to be named as a defendant or even a plaintiff in this action in the capacity of parens patriae is a matter of option and right to be exercised by the State.
>
> "2. *Should the State of Nevada elect to appear in this action in parens patriae, then such appearance and the effect of judgments and decrees of this Court would be limited to the general public interests of the State apart from the individual interests of any private property owners who are named as defendants.* (emphasis supplied)
>
> "3. The State of Nevada cannot appear or be retained in the case in a parens patriae capacity wherein the State would *represent the private property owners* (who are the defendants in this case), so that a judgment against the State would bind private property owners as to their individual property rights. "Parens patriae jurisdiction in the sense of representing individual property rights cannot be conferred upon the State, even if the State desired to have such jurisdiction conferred upon it. Water rights are real property rights in Nevada, and must be asserted or defended by the individual owners of the rights." (emphasis supplied)

The State of Nevada contended first that whether it desired to assert a parens patriae position was optional as a matter of the sovereignty of the State, and secondly that in the event the State did see fit to assert a parens

position, it would be limited to the general public interests aside from the interests of the individual private property owners. The State contended all along that the only parens patriae role in which the State might be cast would be one that would be apart from the rights of individuals and would have to relate to interests of the State itself in its so-called quasi-sovereign capacity.

> "The second line of cases is of American origin and bears on the propriety of suits by a state to *protect* certain of its *own interests* in its so-called *quasi-sovereign capacity. State's Opening Brief on Prior Motion*, Page 4.

Citing *Frito-Lay*, the State alleged that although there are citizens who may not be able to secure relief by other means than having the State sue for their individual rights, and representation by the State is a worthy aim, "this is not the type of State action taken to afford the sort of benefit that the common law concept of parens patriae contemplates . . .". *California v. Frito-Lay, Inc.*, 474 Fed. 2d 774 (Ninth Circuit, 1973).

The State was careful in its Opening Brief of February 26, 1974, to define quasi-sovereign capacity and the interest that might be represented by the State as being something different from the capacity in which the United States and the Tribe would have cast the State had they prevailed in respect to the State's Motion to Dismiss:

> "Quasi-sovereign capacity" (or "interest") is a term which refers to certain legal rights that belong not to any specific individual or individuals, but to the populace, or a large portion thereof, generally, and has included "the health, comfort and welfare of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the State." *State of West Virginia vs. Chas. Pfizer & Co.*, 440

F.2d 1079, *State Protection of the Economy and Environment, Parens Patriae Suits for Damages*, 6 Col. J.L. & Soc. Prob. 411 (1970)." *State's Opening Brief on Prior Motion*, Page 7.

"These suits represent protection of the types of interests which sovereign nations would have a duty to protect." *State's Opening Brief on Prior Motion*, Page 7.

"first, the sovereign (or quasi sovereign) interests to be *afforded judicial recognition must be related to corresponding duties owed by the sovereign to its citizens; and second, the wrong complained of must 'affect the public at large,' not merely the interests of particular individuals.*" (emphasis supplied) Malina and Blechman, *Parens Patriae Suits for Treble Damages under the Anti Trust Laws* 65 Nw. U.I. Rev. 193 (1970). *State's Opening Brief on Prior Motion*, Page 8.

A long series of cases cited by Justice Marshall in *State of Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 92 S.Ct. 885, L.Ed. (2d) 184 (1972), establish the right of a state to *sue* as parens patriae to prevent or repair harm to its quasi-sovereign interests.

The United States Supreme Court has repeatedly noted on many occasions that a state may protect its economy and environment, i.e., its "quasi-sovereign" interests as opposed to protecting the rights of individuals. See, for example, *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497 (1901); *People of State of New York v. New Jersey*, 256 U.S. 296, 41 S.Ct. 492, 65 L.Ed. 937 (1921); *North Dakota v. Minnesota*, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342 (1923); *Kansas v. Colorado*, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956 (1907); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923).

The battle lines in regard to the present motion are clearly drawn, i.e., the Tribe would forbid the State from asserting defensively its purely quasi-sovereign interests, apart and separate from the rights of its individual property owners. The State seeks in opposing the present motion to defend only the broad state's interests which are quasi-sovereign, including the economy at large, the commonweal, and the environment, all of which are clearly and unequivocally defined as rights the State is entitled to assert.

Notwithstanding the fact that nowhere in previous briefs or arguments have the United States or the Tribe ever claimed that their purpose in naming the State in parens was to bind the State in those quasi-sovereign capacities, the Tribe would now (based on the dismissal of the action against the State in parens) like to prevent the State from urging its quasi-sovereign interests in the proceedings.

In the previous motion, the United States and the Tribe sought only to bind the State so far as the individual property rights of its private property owners were concerned. The Court could make no other interpretation of the claim against the State in parens as set forth in the Complaint. Notwithstanding ample opportunity of the United States and the Tribe to allege a claim against these quasi-sovereign interests of the State, none was forthcoming. The Court was left with no alternative but to dismiss the suit because there was no valid authority for the proposition that the State might be sued in parens patriae in the sense of binding its individual property owners in the instant situation.

The State, in oral argument on the previous Motion to Dismiss before the Court on April 21, 1975, consistently maintained that parens patriae could not legally mean what the United States and the Tribe said it did (that the State could stand in judgment for the private property owners in Nevada and bind their rights) but

that parens patriae could and did refer to the quasi-sovereign interests of the State:

> "In this country the doctrine has been enlarged into the area of what we call quasi sovereign interest of the state, the health, welfare, safety, economy, comfort of the citizens of the state. These are rights that are apart from the rights of any individual citizen. They are rights inuring to the state itself. They do not relate to the rights of any individual citizen or group of citizens, or even all of the citizens of the state. That is the extent of the law on parens as it's developed in this country.
>
> "Now, there are two possible exceptions to this. One is the Boundary Case. The second one is the apportionment of interstate streams between states. Those are situations where states act as sovereigns like independent countries. They attempt to solve in court what you would solve by war or diplomacy if the states had continued as independent countries as they were under the Confederacy, in a sense." *Transcript of Hearing April 21, 1975*, Page 5.
>
> "If the state were sued in this quasi sovereignty capacity, we would indeed have no objection, because we think that the state is that. But that isn't what the pleadings say. This is an effort to somehow bind individual property rights by a judgment against the state." *Transcript of Hearing April 21, 1975*, Page 15.

The State virtually conceded that it might be sued in the quasi-sovereign capacity and stated it would not object. Notwithstanding that statement in open Court, the United States and the Tribe persisted arguing that they meant in suing the State in parens patriae to bind individual property rights, and did not mean or intend to seek judgment against quasi-sovereign interests of the State. What choice did the Court have but to dis-

miss? Nowhere in this record have either the Tribe or the United States asserted such a claim against the quasi-sovereign interests of the State, including its commonweal, economy or environment, etc.

In its oral argument of April 21, 1975, the State summarized its view:

> "Finally, so far as our pleadings go, we agree to the extent that this is something that will hurt our economy, hurt the welfare of our people, affect our quasi sovereign interests, that we think that the state would have a right to come into plead and to allege and to present its case for parens patriae, because that is parens patriae.
>
> "But that isn't the way this case is pleaded. This case is pleaded in an effort to affect individual property rights of some part of the people, of some individuals who claim an interest in this river. It is not pleaded in this quasi sovereign-type of capacity. The governmental capacity, we have not moved to object that." *Transcript of Hearing of April 21, 1975*, Pages 31 and 32.

The issues were clearly outlined and argued on all sides. We stated that the State might be made a party as parens patriae if that were read as a complaint to affect the quasi-sovereign interests of the State, but that is not what the United States or the Tribe sought. They did *not* contend for it then and the Tribe does not contend for it now. The complaint only sought to sue the State in parens patriae to bind its individual water users and private property owners.

D. *Judgment of the Court*

1. Judgment of the Court on the Motion of the State to be dismissed in parens patriae was entered on April 29, 1975. The Court held under the circumstances and on the basis of contentions by the United States and the

Tribe, the State would be dismissed as a defendant in parens patriae. The Court held that the judgment could not be entered against the State so as to bind individual property owners.

2. The Court, in its Order, did not forbid the State from asserting (if it chose to do so at its election) its quasi-sovereign interests, those which are apart from the interests of the individual property owners. Whether you call these quasi-sovereign interests parens patriae or give them any other name makes no difference. The Court held that the doctrine of parens patriae simply does not extend into the area of binding individual property rights through a suit against a state, but did not limit the State in asserting its quasi-sovereign interests.

3. The Court in its Judgment of April 29, 1975, placed *at rest* the question of whether the State could be denominated parens patriae in the Complaint for quiet title, in a manner whereby the private property owners in Nevada would be bound by a judgment against the State. The Court said judgment could not be taken against the State with that effect. The Court placed at rest the question of whether it made any difference that the Complaint was for an allocation, a general adjudication, or other determination of water rights. These distinctions just don't make any difference.

The Tribe now seeks to expand the Order of April 29, 1975, which held that individual property rights could not be bound by a judgment against the State and seeks, by its present motion, to exclude highly relevant and admissible evidence which the State has every right to present at the bifurcated trial.

4. The Court found a diversity of interests as between various citizens of Nevada as a reason to dismiss the state in parens patriae in the sense that judgment against the State would bind individual property owners. However, in the sense of defending quasi-sovereign inter-

ests of the State, the same distinction will not apply. In any case urged by a state, or defended by a state in regard to its commonweal, economy and environment (its own and quasi-sovereign interest), there will always be diversity of interests as between the state and some of its residents. The larger interests of the broad population will always be at odds with some citizens of the same state.

A good example is a suit to stop a factory polluting the air. On the one side will be ranged the owners, workers and shareholders of the factory, and the block of citizens who derive benefit from the factory. On the other side will be ranged the interests of the State, the quasi-sovereign interest in protecting the atmosphere.

The same diversity will be found in actions affecting the economy, health and welfare of the State. See for example *Hawaii v. Standard Oil*, supra.

II. THE PRESENT MOTION BY THE TRIBE

A. *What the Tribe now seeks.*

1. The Tribe by its present motion seeks an order precluding the Defendant State of Nevada from asserting or attempting to prove at the bifurcated trial injury to the commonweal and economy of the State of Nevada. Plaintiff-Intervenor's motion is labeled a "motion to strike" pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, or in the alternative a motion for the "early determination of a special legal question" pursuant to Section 1.80 of the Manual for Complex Litigation.

The Tribe seeks to exclude evidence of damage to the economy of the State of Nevada or evidence that the citizens of the State of Nevada at large detrimentally relied on the Orr Ditch Decree. Plaintiff-Intervenor contends that since the State has been dismissed as parens patriae, this evidence should be excluded at the bifurcated trial.

2. The Tribe recognizes that the reliance by the State and the people of Nevada on the Orr Water Ditch Decree is extensive and far reaching. It is far greater than the reliance by the actual parties to the Orr Ditch Decree itself or the parties to the present action. Practically all of the citizens of Nevada have relied on the Orr Ditch Decree for generations. Businesses have been founded and developed and the entire economy and well-being of the State has developed in reliance on the availability of waters decreed in Orr Ditch.

The Tribe also recognizes that evidence of the damages to the State's economy is a proper topic to be presented to the Court. The present motion addresses itself to the specific question of whether since the State has been dismissed in parens patriae, it may now introduce evidence of its quasi-sovereign interests at the bifurcated trial on the topic of detrimental reliance.

3. Defendant State of Nevada contends that evidence of the reliance placed on Orr Ditch by the State and its citizens as a whole is highly relevant to the issue of what detrimental reliance has been placed on Orr Ditch by the State of Nevada. The reliance of the "State of Nevada" necessarily includes the reliance of its entire citizenry in development of the State's economy and environment.

The State has steadfastly maintained that it has the right to defend or assert its quasi-sovereign interests and is in the process of compiling evidence to be presented at the bifurcated trial on this issue. The State feels that since the Tribe has sought to raise this issue by its motion, this Court should now determine whether the State may protect its "quasi-sovereign" interests and whether evidence related to those interests may properly be presented at the bifurcated trial.

B. *The Motion to Strike Should be Denied.*

1. The Defendant contends that the Court should ignore Plaintiff-Intervenor's motion to strike and decide

the issue pursuant to Plaintiff-Intervenor's second ground for raising the issue, i.e., "a special legal question requiring an early determination".

2. Rule 12(f), Federal Rules of Civil Procedure, provides:

> "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Obviously, Plaintiff-Intervenor's motion to strike is not timely pursuant to Rule 12(f), supra, being more than twenty days after service of the last pleadings; hence, Plaintiff-Intervenor must be asking the Court to strike the material it wishes stricken upon the Court's own initiative.

In the proper circumstances, the Court may order material stricken even though the moving party's motion is not timely. See, for example, *Strahle-Johnson Supply Company v. John Douglas Company*, D.C. Tenn. 1940, 1 FRD 279.

The Court should not order material stricken, however, unless it appears that the material to be stricken has no possible relation to the controversy. *Moore v. Prudential Insurance Company of America*, D.C.N.C. 1958, 166 Fed. Supp. 215. Also see *2A Moore's Federal Practice*, Sec. 12.21 (2) where it is stated:

> "Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied.

> Even if the allegations are redundant or immaterial, they need not be stricken if their presence in the pleading cannot prejudice the adverse party."

Purex Corporation v. General Foods Corp., 318 Fed. Supp. 322, 323 (D.C. Cal. 1970) cited by Plaintiff-Intervenor in its motion, sets forth the test of "no possibility of success" as the proper factor to be considered. The Court stated in 318 Fed. Supp. at page 323:

> "a defendant should be given the opportunity to prove his allegations *if there is any possibility* that the defense might succeed, after a full hearing on the merits (citing cases). (emphasis supplied)

See also *Louisiana Sulphur Carriers, Inc. v. Gulf Resources and Chemical Corp.*, 53 FRD 458 (D. Del. 1971), also cited by Plaintiff-Intervenor, wherein it is stated:

> "Motions to strike are not favored and will not ordinarily be granted *unless the insufficiency is "clearly apparent"*, 1A Baron & Holtzoff Federal Practice and Procedure, Sec. 368, Pg. 5016 (1960) . . . . *motions to strike are often denied even when technically correct and well founded.* Wright & Miller Federal Practice and Procedure, Sec. 1381, pgs. 799-800 (1969); 2A Moore Federal Practice, paragraph 12.21(2)." P. 460 (emphasis supplied)

Defendant State of Nevada contends that the Plaintiff-Intervenor has not met its burden of demonstrating that the pleadings sought to be stricken have "no possible relation to the controversy" or "no possibility of success".

C. *The Issue is Properly Before the Court on Plaintiff-Intervenor's Second Ground.*

1. Sec. 1.80 of the Manual for Complex Litigation reveals little in relation to the specific motions sought to be encompassed by that section. That section would seem to be broad enough, however, to include mo-

tions in limine, motions to exclude evidence, motions to suppress, or any other motion sought to prevent a party from litigating an issue or presenting evidence as to that issue at trial. In short, the section seems to be directed to resolving any issue that might tend to expedite the trial or discovery prior thereto. We believe it will materially assist the proceeding to resolve this issue now.

III. DOES THE DISMISSAL OF THE STATE IN ITS CAPACITY OF PARENS PATRIAE BAR THE ASSERTION BY THE STATE OF ITS QUASI-SOVEREIGN INTERESTS AT THE BIFURCATED TRIAL?

A. *Can we effectively sort out the State in Parens Patriae as not standing in judgment for the individual property owners, but still retaining the right to assert quasi-sovereign interests?*

1. The Court in its Judgment dated April 29, 1975, found that the doctrine of parens patriae does not extend into the area of casting the State in that role so that a judgment against the State will bind individual property rights. The Court in making that judgment did not adjudge that the State could not assert quasi-sovereign interests in an action such as that at bar. It is argued by the Tribe that the State can't have it both ways, i.e., be dismissed in parens and yet assert what the Tribe denominates as parens type defenses at the bifurcated trial.

The Tribe's position is a misapplication of the definition of parens patriae. Parens patriae simply does not mean what it was contended to mean by the Tribe and the United States in connection with the previous motion. Parens patriae does mean that the State can assert its quasi-sovereign interests in defending a case brought against private water users within the state. *California v. U.S.*, 180 Fed. 2d 596 (1950). The State can assert

and contend for what it is legal for it to contend for and assert, but a party suing the state cannot contend for something that may not be legally asserted against a state.

The two contentions are unrelated in the common law. The law of parens patriae as it has developed in common law did not extend to quasi-sovereign interests. It was limited to the Royal Prerogative (protection of incompetents and concern for charities). In the United States the Courts have extended the doctrine of parens patriae into the area of quasi-sovereign interests, such as the commonweal and the economy of the State, but they have not extended the doctrine of parens patriae into the area of binding private property owners by judgments against the State, except in *interstate* equitable water apportionment cases and boundary disputes. (see Malina and Blechman, supra, and State's Opening Brief on Prior Motion).

So, we asked the question, can the State have it both ways, and the answer is Yes. The State may not (unless it wishes) be sued so as to bind the individual property owners, but it may assert its quasi-sovereign interests.

2. The assertion of the State of its quasi-sovereign interests is classic in this case. The State herein, in regard to the instant motion, seeks to defend those broad interests which have for a long time in American Jurisprudence been accepted as interests belonging to the State. We seek to assert classic quasi-sovereign interests.

In *Land O'Lakes v. Louisiana*, 160 F. Supp. 387 (1958) at page 388, the Court defines these quasi-sovereign interests which a State may assert, as:

> "Such an interest is lacking when a state undertakes to sue for the particular benefit of a limited number of its citizens. In such a posture the *state is a 'mere volunteer'*. The state must show a direct

> interest of its own and *not merely seek recovery for the benefit of individuals who are the real parties in interest.* Apart from direct proprietory rights . . . a State may have such an interest only by virtue of its duty to protect the general welfare as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens." (emphasis supplied)

Parens in this sense must affect the interests of the public at large, not merely the interests of individuals. Justice Holmes in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) made the distinction between representation by a state of individual property interests and the legitimate interest of a state "in the welfare of the citizens, the interest which it asserts as parens patriae, independent of particular interests of individual citizens, even when it relates to the same subject matter . . .".

3. It is perhaps difficult to see the distinction which is raised here. The State has interests as a State which are apart from the private individual property rights of its citizens. The assertion of those quasi-sovereign interests of the State do not affect the ownership of individual property rights, but they do affect such broad concerns of a State as its economy, environment, and the quality of life of the people.

Malina and Blechman, supra, at page 209, conclude that:

> "The State, as parens patriae, can bring suit only to protect the common welfare of its people as a whole. It cannot sue merely to promote the *individual interests* of some—or even all—of its citizens." (emphasis supplied)

4. *California v. U.S.*, supra, we think is a case that speaks in our favor. In *California v. United States*, supra, the State of California was permitted to inter-

vene as a defendant to assert its quasi-sovereign rights. The quotation from *California v. United States* contained in the Tribe's Opening Brief on the instant motion indicates the clear right of the state to assert those quasi-sovereign interests. In asserting those quasi-sovereign interests, the State does not bind individual property rights, it binds only its own interest. See also page 10 of the State's Opening Brief on the Previous Motion, as filed, under date of February 26, 1974.

The State of California was not entering that case in a posture of asserting individual property rights of its citizens. It was found by the Court that the Sierra Valley Water Company "can only assert in Court the rights of its shareholders and cannot adequately protect the State's interests in the public welfare." *California v. United States*, supra, at page 599.

California v. United States was a suit brought by the United States to quiet title to waters of the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the Newlands Project. The State of California was authorized by the Ninth Circuit in its parens patriae position in defense of the public welfare of the State of California to enter into that case to assert the damage that might be done to the quasi-sovereign interests of the State if the judgments sought were entered. Therefore, *California v. U.S.* case is clearly authority for the Court to deny the present motion brought by the Tribe. It is on all fours the same, but it is not on all fours the same as the contention for parens patriae made in the original Complaint by the Tribe and the United States in respect to which the State has been dismissed. The State of California did not endeavor to come into *California v. U.S.* as a representative of private property rights with the intent that a judgment against the State would bind any private water users in the State of California. The only private water users in the State of California who would be bound by the judgment in *California v. U.S.*

were the shareholders of the Sierra Valley Water Company and the Sierra Pacific Power Company.

B. *What is in a name?*

1. The Tribe cannot by tagging certain positions as parens patriae succeed in its present motion. There is little in a label. We are talking about apples and oranges here.

By denominating its previous claim against the State as parens patriae (with resultant dismissal because it was not a claim cognizable in law as parens patriae), the Tribe would now say because they previously made an invalid claim which they called parens patriae (when there was no such thing) the State cannot now assert a valid parens patriae defense relating to its quasi-sovereign interests.

The Tribe would say you are either parens patriae or you are not. This may be true, but not on the basis of a previous finding of this Court that what the Tribe called parens patriae in the Complaint was not legally parens patriae at all. By suing the State improperly in parens patriae, the Tribe would forbid the State's proper parens patriae defense. The State cannot be placed in a dilemma of having to chance having an invalid judgment taken against it, so as to assert a legally valid defense of its quasi-sovereign interests.

A judgment against the State in asserting its quasi-sovereign interests will not bind or affect the rights of property owners as individuals, but will only bind the State in its separate quasi-sovereign capacity in regard to the commonweal, the economy and the environment.

2. In citing *California v. United States*, supra, in its present brief, the Tribe endeavors to make that case mean the reverse of what it cited the case for in its brief in respect to the prior motion. Previously the Tribe contended *California v. U.S.* meant that a suit

might be brought against the State of California and thereby bind its private water users. Now, like the "two faces of Eve", the Tribe places a new interpretation on *California v. United States*. The Tribe would have this Court, which has previously held that *California v. United States* was not authority for the State of Nevada to stand in judgment for its individual water users, now hold on the basis of *California v. United States* that the State may not assert its position as parens patriae to assert its quasi-sovereign interests in its commonweal, economy, etc. This won't wash. The Tribe may even be apparently claiming that *California v. United States* was misinterpreted by this Court previously. There was no such misinterpretation. That case was correctly applied.

III. CONCLUSION

A. The State is dismissed as a defendant in parens insofar as the allegation of the Complaint was that a judgment could be taken against the State which would bind individual property rights of private individuals residing in the State. The State cannot stand in judgment of the individuals as to their private property rights. The individuals properly will be given their day in Court. The parens patriae doctrine has not previously been extended into this area, except in water apportionment cases between states and boundary disputes.

B. The State is not foreclosed by the previous judgment dismissing it as a defendant, in parens in the sense mentioned in Paragraph I, from defensively asserting its quasi-sovereign interests in the commonweal, the economy and environment, which are interests inuring to the State itself and which do not belong to any individual. Parens patriae in the sense of defending the commonweal is a totally different posture from that for which the State was dismissed as described in Paragraph I.

The State of Nevada respectfully prays that the Motion to Strike be denied and that it be adjudged that the State may present its evidence in defense of its quasi-sovereign interests in its commonweal, economy and environment at the bifurcated trial on the issue of res judicata.

Dated: June 9, 1975.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

PLAINTIFF-INTERVENOR'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO STRIKE OR, IN THE ALTERNATIVE, FOR AN EARLY DETERMINATION OF A SPECIAL LEGAL QUESTION

The State in its Response to the Tribe's Motion to Strike, or in the alternative, for an Early Determination

of a Special Legal Question, rambles on for a full 23 pages without citing a single authority to support its bifurcated concept of *parens patriae*: (1) standing in judgment for its water users claiming under State law; and (2) asserting the State's quasi-sovereign interests.

Cutting through the surplusage in the State's response, it is clear that the law does not recognize any such distinction. Perhaps the identity of the two concepts most clearly emerges from *New Jersey v. New York*, 345 U.S. 369, 372-3 (1953):

> [I]t [the *parens patriae*' doctrine] is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, *must be* deemed to represent all its citizens; *Kentucky v. Indiana*, 281 U.S. 167, 173 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties. . . .
>
> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own rights, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state. (Emphasis added)

Asserting sovereign and quasi-sovereign interests and representing all of its citizens are two sides of the same coin. When the State asserts its sovereign interest in a suit, it necessarily "represents", in the sense of "stands in judgment for," all of its citizens. It is only by representing all of its citizens that the State can assert its sovereign or quasi-sovereign interests. The State of Nevada has made its election. Having declined to represent its citizens, it cannot now come in the back door, as it were, seeking to protect their interests.

Paragraph II (at p. 74) of the Complaint of the United States (incorporated in Paragraph II of the Tribe's Complaint in Intervention) specifically states:

> The State of Nevada is named as a party defendant in this action in its proprietary capacity, in its governmental capacity as the issuer of permits to appropriate unappropriated waters, and as *parens patriae* for its citizens.

In its proprietary capacity, Nevada has a legitimate interest in protecting the Truckee River water rights that it owns or claims to own as a property owner. In its governmental capacity, Nevada has a legitimate interest in protecting the permits that it issued authorizing the appropriation of the unappropriated waters of the Truckee River. As "*parens patriae* for its citizens," Nevada could protect the interests of its citizens in the state's water resources. But once it has chosen not to represent its citizens, how can it possibly nevertheless represent their interests in the state's water?

When the state acts *parens patriae*, it is acting for its citizens. Every parens patriae water case makes that abundantly clear. How can it act in behalf of its citizens without representing its citizens? Once it has chosen not to represent its citizens and has specifically been dismissed from this lawsuit in that capacity, it is an absurdity, a contradiction, to suggest that it can nevertheless continue to represent their interests.

The absurdity of Nevada's position becomes clear when one asks the question: "Whose sovereign or quasi-sovereign interests is Nevada seeking to protect?" Answer: The interests of its citizens in maximizing the water resources of the state that are available for appropriation pursuant to state law. Thus, it becomes clear that Nevada wants to assert and protect the interests of its citizens without representing their interests. That, we respectfully suggest, is an absurdity. Many decisions

of the Supreme Court, totally ignored by Nevada, make this point with utmost clarity.

1. *Kansas v. Colorado*, 185 U.S. 125, 142 ( ):

> [T]he original jurisdiction of this court . . . might be invoked by the state as *parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens.

2. *Wyoming v. Colorado*, 25a U.S. 419, 468 (1922):

> As respects Wyoming, the welfare, prosperity, and happiness of the people of the larger part of the Laramie Valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that state. Thus, the interests of the state are *indissolubly* linked with the rights of the appropriators. (Emphasis added)*

3. *New York v. New Jersey*, 256 U.S. 296, 301-2 (1921):

> The health, comfort, and prosperity of the people of the state and the value of their property being gravely menaced, ... the state is the property party to represent and defend such rights by resort to the remedy of an original suit in this court . . .

4. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935):

> The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than

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* Nevada is here seeking to dissolve the indissoluble.

those of Wyoming, and an adjudication of the defendant's [i.e. Wyoming's] rights will necessarily bind him. *Wyoming will stand in judgment for him as for any other appropriator in that state.* He is not a necessary party. (footnote omitted, emphasis added).

CONCLUSION

Nevada candidly admits that it wants to have the best of both worlds. Nevada's Response, p. 19. Fortunately, the law very clearly prohibits such an inequity. Having made its choice, Nevada must now suffer the consequences. The Tribe's Motion to Strike, or, in the alternative, for an early Determination of a Special Legal Question should be decided in its favor.

Dated: June 26, 1975.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987 JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

MEMORANDUM DECISION AND ORDER DENYING MOTION

Plaintiff-Intervenor, Pyramid Lake Paiute Tribe of Indians, filed a motion to strike pursuant to Rule 12(f) of the Federal Rules of Civil Procedure or, in the alternative, for an early determination of a special legal question pursuant to § 1.80 of the Manual for Complex Litigation. The order sought to be obtained would preclude the defendant State of Nevada from asserting or attempting to prove injury to "the commonweal and economy of the State of Nevada" in this action. This motion is DENIED.

The thrust of the Tribe's contention is that the defendant State of Nevada filed a motion with this Court on August 15, 1974, seeking dismissal in the state's capacity as parens patriae. This motion was granted by this Court on April 29, 1975, thereby dismissing the State of Nevada in its capacity of parens patriae. The Tribe now contends that since the State of Nevada sought and received dis-

missal as parens patriae, it is now foreclosed from asserting any injury to its economy as that assertion would necessarily be made in the State of Nevada's capacity as parens patriae.

The State of Nevada counters by properly pointing out that in the previous motion the United States and the Tribe sought only to bind the state so far as the individual property rights of its private property owners were concerned. Therefore, this Court properly dismissed the state as parens patriae because the state could not be sued in parens patriae in the sense of binding its individual property owners.

> "This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *State of Georgia v. Tennessee Copper*, 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907)

The State of Nevada now wishes to assert injury to its commonweal and economy, i.e., its quasi-sovereign interests. *People of the State of California v. United States*, 180 F.2d 596 (9th Cir. 1950), cert. denied, 340 U.S. 826, is authority to allow a state to assert, in parens patriae, the damage that might be done to its quasi-sovereign interests. The court there stated:

> "That is the right, if not the duty, of the State, . . . to protect them in this litigation as they are necessarily involved in any decree which might award the plaintiff the relief asked for in the complaint, or any relief, and, that the Water Company can only assert in court the rights of its shareholders and cannot adequately protect the State's interest *in its public welfare.*" (emphasis ours)

To now forbid the State of Nevada from introducing evidence of injury to its welfare would have the effect of penalizing the State, for making a proper motion to an

inappropriate application of parens patriae, by foreclosing the State in asserting parens patriae in its proper capacity as it now seeks to invoke.

In accordance with the Tribe's motion for early determination of a special legal question, this Court is of the opinion that the State of Nevada may assert injury to its commonweal and economy as these are proper interests to be protected by parens patriae.

IT IS SO ORDERED that the Tribe's motion to strike and, likewise, as discussed above, the Tribe's motion for early determination of a special legal question is, and hereby are, DENIED.

Dated this 26th day of July, 1975.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

FIRST AMENDMENT TO ANSWERS OF TRUCKEE-CARSON IRRIGATION DISTRICT

Comes now, Truckee-Carson Irrigation District on its own behalf and on behalf of the class defendants whom it represents, and amends its Answers to allege as follows:

VI

As a separate and affirmative defense, Defendant Truckee-Carson Irrigation District, on its own behalf and on behalf of the class defendants, alleges as follows: The Newlands Project is now and at all times relevant hereto has been an authorized federal reclamation project. The Truckee Canal was constructed by the United States as a part of said project. Before August 13, 1946, the United States diverted water from the Truckee River at Derby Dam through the Truckee Canal and other project facilities to lands within the Newlands Project for use on said lands for irrigation and other beneficial purposes. Such acts, if actionable at all, constituted a taking by the United States without payment of agreed compensation of the water rights, if any, which the United States and Intervenors assert in this action to have been reserved to the Pyramid Lake Indian Reservation. Intervenors have pursued their sole remedy for said taking under the United States Constitution and Section 70a of Title 25 of the United States Code in that Intervenors filed a petition for compensation and damages and other relief with the Indian Claims Commission. Thereafter, on or about March 26, 1975, a compromise and settlement of all of the water claims of Intervenors was entered into by the United States and the Pyramid Lake Paiute Tribe and thereafter duly approved by the Commissioner of Indian Affairs. By the terms of said compromise and settlement, it was agreed that the United States will allow a final judgment to be entered against it in favor of Intervenors in the amount of $8 million, and that any claim for compensation based upon acts or omissions of the United States prior to March 26, 1975, that allegedly resulted in the loss of fish or fisheries, water or water rights of the Pyramid Lake Indian Reservation shall be forever barred. On or about July 23, 1975, said compromise and settlement was approved by the Indian Claims Commission. Said compromise and settlement bar each and every one of the claims asserted in this suit by the United States or

by Intervenors against Defendant Truckee-Carson Irrigation District and the class defendants and further estop the United States from contending herein that any of the water rights which it asserts in this action in any capacity as having been reserved for the Pyramid Lake Indian Reservation were not in fact taken from the Indians by the United States before August 13, 1946, and subordinated to Claim No. 3 and Claim No. 4 of the final decree of this court in *United States* v. *Orr Water Ditch Company*, Equity No. A-3.

VII

As a separate and affirmative defense, Defendant Truckee-Carson Irrigation District on its own behalf and on behalf of the class defendants alleges as follows: Defendant by this reference incorporates each and every allegation of its separate and affirmative defense as set forth in Paragraph VI above, and realleges the same as if set forth in full herein. It is further alleged that the United States has constructed, and is now in the process of constructing, duly authorized federal projects on the Pyramid Lake Reservation and upsteam from it which have, together with other acts, in fact restored the fisheries in the Truckee River and in Pyramid Lake. Said projects have been constructed, in whole or in part, and, at the express request of the Pyramid Lake Tribe of Paiute Indians, they have been operated and used for the purpose of restoring said fisheries. These projects include Prosser Dam, Stampede Dam, Marble Bluff Dam, and various extensive improvements to the channel of the mouth of the Truckee River and have cost approximately $25 million to date. The construction and operation of said projects for the purpose of restoring said fisheries would not have been needed at all if the United States on behalf of the Pyramid Lake Indians had a reserved right to the use of the waters of the Truckee River, as alleged in its complaint. It is further alleged that Congress and

the Executive Branch recognized that the Pyramid Lake Indians had no reserved rights to the use of the waters of the Truckee River for the stabilization of Pyramid Lake or for fishery purposes, and Congress in authorizing said projects and appropriating the funds therefore, and the Executive Branch, in proposing said projects and thereafter operating them for such purposes, have ratified and confirmed the taking of the waters of the Truckee River, and the alleged rights of the Pyramid Lake Indians, for the Newlands Project.

VIII

As a separate and affirmative defense, Defendant Truckee-Carson Irrigation District, on its own behalf and on behalf of the class defendants, alleges that prior to the filing of this action, the United States of America, the Truckee-Carson Irrigation District, the Washoe County Conservation District, the Sierra-Pacific Power Company, and such other users of water in the Truckee River and/or its tributaries within the conservation district as became parties thereto by signing their names to it, entered into a certain agreement entitled "Truckee River Agreement" and a certain stipulation referred to therein providing for entry of a final decree by this court in the case of United States of America v. Orr Water Ditch Company, et al., Equity No. A3. Said agreement and stipulation were duly approved by the Secretary of the Interior and the United States Attorney General. As to Defendant Truckee-Carson Irrigation District and the class defendants, said Truckee River Agreement and stipulation compromised, settled and, with the sole exception of Claim No. 1 and Claim No. 2, subordinated the priority of all claims of the United States to Claim No. 3 and Claim No. 4 of said final decree. Among the claims so compromised, settled and subordinated are all of the claims now asserted by the United States in any capacity in its alleged cause of action herein, or by Intervenors in their complaint in in-

tervention. Said agreement, stipulation, and the decree entered pursuant thereto therefore bar this suit.

Dated: September 23, 1975.

E. J. SKEEN
JAMES W. JOHNSON, JR.
FREDERICK G. GIRARD

By /s/ Frederick G. Girard
FREDERICK G. GIRARD
Attorneys for Truckee-Carson Irrigation District

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Attorneys for Defendant State of Nevada

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

SUPPLEMENTAL ANSWER

COMES NOW, Defendant State of Nevada, and supplements its Answer filed herein August 15, 1974, by adding the following additional Affirmative Defenses:

XVI

1. The Plaintiff and the Plaintiff-Intervenor have entered into a Stipulated Compromise Settlement, which has been approved by the Indian Claims Commission. Said Stipulated Compromise Settlement is a compromise and settlement in full for the claim alleged in the instant action and constitutes a bar to the same.

XVII

1. Since the commencement of this action an agreement of accord and satisfaction has been made between the plaintiff and the plaintiff in intervention which con-

stitutes a full satisfaction and discharge of the claims which are the basis of this action and the same thereby are barred.

XVIII

Defendant by this reference incorporates the allegations contained in its Paragraphs XVI and XVII above. The action brought by the plaintiff in intervention before the Indian Claims Commission constituted an election of remedies and stands as a bar to the instant action.

XIX

The Government of the United States has constructed dams and other improvements in and appurtenant to the Truckee River with the objective of restoring and maintaining a viable fishery in Pyramid Lake. Said acts constitute a ratification of the actions of the United States of America and its agents during the course of the Orr Ditch case and stands as a bar to the claims made in the instant action.

XX

The Congress of the United States subsequent to the entry of the final decree in the Orr Ditch case has enacted legislation with the objective of restoring and maintaining a viable fishery in Pyramid Lake. Said acts constitute a ratification of the acts of the United States and its agents during the course of the Orr Ditch proceedings and stands as a bar to the claims made in the instant action.

Dated: September 23, 1975.

ROBERT LIST,
Attorney General of Nevada

JAMES C. THOMPSON
Chief Deputy Attorney General

EDWARD C. REED, JR.
Special Deputy Attorney General

By: /s/ Edward C. Reed, Jr.
EDWARD C. REED, Jr.
Special Deputy Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil No. 8-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

FINDINGS AND ORDER

In this case the Court takes judicial notice that all defendants have relied upon the terms, provisions, and the various water rights declared and decreed by this Court in the *Orr Water Ditch Co. Decree*, Equity No. A-3, entered the 8th day of September, 1944. That such reliance has been either direct by reason of the ownership of certain of the decreed rights by defendants or indirect by reason of the dependence of the defendants on waters the right to the use of which has been decreed to others in the *Orr Ditch Case.*

The Court further finds and judicially notices as a fact that in the area of Northwest Nevada the water rights decreed in the *Orr Ditch Case* are in an arid and dry region and that all facets of life and economy in said area have been and are dependent upon the beneficial use of the waters of the Truckee River and its tributaries.

These areas of Northwest Nevada are typical of the many arid regions of other Western States or portions thereof.

The Court further finds and judicially notices that if the defendants were permitted to do so that they would severally and collectively produce before this Court credible evidence of the investment since 1944 of billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems, and other municipal, and industrial facilities and operations; that there are improvements and investments of a like and similar nature which are presently underway; and that there has been a very steady population growth in said area since 1944.

No witnesses need or may be called by defendants to establish the precise details of such investment or of population or economic statistics or other factors set forth herein. However, any party may offer summaries as to the details of the matters covered herein.

Dated: April 2, 1976

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

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Intervention

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiffs-In-Intervention,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

POST TRIAL BRIEF OF THE UNITED STATES OF AMERICA AND THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS
VOLUME II

IV. THE CLAIM FOR WATER RIGHTS FOR FISHERY PURPOSES THAT IS SOUGHT IN THIS ACTION IS NOT THE SAME AS THE CLAIMS INVOLVED IN THE ORR WATER DITCH CASE.

It is acknowldged by most of the defendants that a water right for fishery purposes was not in fact litigated in the *Orr Water Ditch* case.[74] The question then is whether that claim is an inherent part of the Winters doctrine claim for water for irrigation purposes that was brought and litigated in *Orr Water Ditch*. Put another

---

[74] The only dissenters are the City of Reno, Post Trial Brief at pp. 98 and 137, and Washoe County, Post Trial Brief at pp. 15-19. See, our discussion, pp. ii-iv, *supra*.

way, the issue is whether the United States [75] has impermissibly split its cause of action by not having brought and litigated the water right for fishery purposes in *Orr Water Ditch*.

This question is more difficult than the identity of parties-Due Process aspect of res judicata primarily because there is evidence of a general nature indicating that the participants in *Orr Water Ditch*, including the parties, the Special Master, and the Court, believed that its Final Decree would be the last word on the subject. On the other hand, there is the unequivocal statement of the Attorney General and one of the government's principal attorneys in the *Orr Water Ditch* case, Ethelbert Ward, that the water right for fishery purposes was not, and never had been, involved in that adjudication. U-23 and U-24.

While certainly relevant, neither the general expectations of the participants nor the specific views of the government's attorneys are dispositive of the identity of claims issue, particularly since they point in opposite directions. Rather, the outcome depends on a detailed analysis of the relevant case law as well as the anomolous consequences of a holding that the government has impermissibly split its cause of action.

---

[75] For purposes of this argument only, it is assumed that the Tribe is in privity with the United States.

III EXHIBITS

PLAINTIFF'S EXHIBIT U-4

Admitted Nov. 24, 1975

THE SECRETARY OF THE INTERIOR
Washington, D.C.

[SEAL]

The Attorney General.

Sir:

With reference to my letter of August 21 concerning pending and proposed litigation affecting Lake Tahoe (Truckee-Carson Reclamation project):

* * * *

With reference to the determination of water rights: Upon careful consideration of the whole subject it appears that the desired result (the determination by judicial decree of all water rights in Lake Tahoe and Truckee River above the intake of the Truckee-Carson Reclamation project) can best be attained by a single suit to be brought by the United States in the District Court of the United States at Reno, Nevada, against all claimants to the right to use or enjoy the said waters, both in Nevada and in California, including the riparian owners on Lake Tahoe. I therefore respectfully request that you cause such a suit to be instituted.

Mr. D. W. Cole, Project Engineer of the Reclamation Service at Fallon, Nevada, will give all information in his possession to the proper representative of your Department upon request.

* * * *

Yours respectfully,
/s/ [Illegible]
Secretary

EXHIBIT U-10

MEMORANDUM AS TO THE WATER RIGHTS OF THE TRUCKEE-CARSON RECLAMATION PROJECT AND WHAT STEPS SHOULD BE TAKEN TO PROTECT AND IMPROVE THEM

• • • •

Reserved Rights

The United States under the view of the law held by this department, in which view I concur, by determining upon this project and giving general notice of the intention to carry it out reserve to itself and withdrew from further appropriation by others, all of the then unappropriated waters of the Truckee river and now has and ever since such withdrawal has had the fullest right to such waters to use in any way it sees fit. Nevada being a State that has adopted the pure doctrine of appropriation under which riparian rights are abolished and the appropriation alone gives a right to the use of water, this theory of the Government's reserved rights can be applied to its fullest extent and is not, in theory at least, even dependent upon the present ownership by the Government of any lands in Nevada. This doctrine, however, has not as yet been established by the Courts. *Pyramid Lake Indian Reservation Rights.*

The Truckee river from Wadsworth, Nevada, to Pyramid Lake, a distance of about 20 miles, flows through the Pyramid Lake Indian Reservation, and Pyramid Lake itself, a body of fresh but somewhat brackish water, about 50 miles long and 12 miles wide, with no outlet, is within that reservation. Also, the reservation includes a part of Winnemucca Lake.

About six hundred and eleven Indians belong on the reservation. Of these, some two hundred and fifty are heads of families. The reservation contains some 322,000 acres. Of this area, the Indians now irrigate from the

river some 1,200 acres of bottom lands and they have since about 1890, irrigated in the neighborhood of 1,000 acres. Mr. Oliver, the superintendent, estimates that the duty of water there is from one-half to one inch per acre. The present ditch that supplies these lands was taken out some 20 years ago and has been since enlarged. Mr. Oliver tells me the reservation was established by executive order in 1859 or 1860, and that probably ever since that time there has been some irrigation by the Indians. If he is right as to this, the Indians, as appropriators, have about, if not quite, the first water rights on the river.

The Truckee-Carson Project contemplates the irrigation of some 20,000 acres of land within this reservation, extending from Wadsworth to Pyramid Lake.

Certain persons within the last 25 years have squatted on some 3,360 acres of the reservation. A considerable number of these squatters are on some of the best bottom lands along the river near Wadsworth. They have taken water from the river and applied it to the lands they have been holding.

The present state of the law does not permit of saying just what the rights of the Government are in the Truckee river, due to the fact that the river flows through this reservation.

1st. It would seem to be without question that the Government has a valid right as an appropriator, to as much water as has been used either by the Indians themselves, or by the Government for them, or for the purposes of the officers and agents of the Goverment on the reservation. If these rights depend only upon prior appropriation, their priorities will vary with the dates of the appropriations.

2nd. Probably the United States is entitled to certain water rights on the theory that at the time the reservation was established, the United States was the owner

of the usufruct of all of the waters of the Truckee river, or at least to all theretofore not appropriated by others and that, by the setting aside of the reservation, it reserved either (by one theory) full riparian rights in the river for the lands so withdrawn, or (by the other theory) sufficient water for the use of said lands.

Winters vs. United States, 207 U.S. 564.

United States vs. *Conrad Investment Co.*, 156 Fed. 123.

Wiel, page 238; and cases cited.

Whether the Government has any water rights as incident to or because of an Indian Reservation established as this was, by executive order, in a State which repudiates the riparian doctrine, has not been established. In the Winters case the land and water were in a State that still has, like California, mixed riparian and appropriation doctrines, and the Indians, in exchange for the reservation, ceded to the Government their rights in a much larger area, and this was all done while the State (Montana) was still a territory. The Court treated the case as one of an interpretation of a contract between the Indians and the United States, and it may be that the decision would have been different if this feature were absent.

In the Conrad Investment Company case, which also arose in Montana, the District Judge Wolverton evidently did not regard the contract or treaty feature of the Winters case (the opinion of the Circuit Court of Appeals only and not that of the Supreme Court was before him) as controlling. He said:

> "The primary question involved here, in my opinion, has been settled by the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of Winters vs. United States, 143 Fed. 740, . . . It was there determined, . . . in effect that the United States, as owner of the lands—that is, such as have

> been appropriated, set aside, or reserved for the government's use and benefit, bordering on a public stream, is of right, entitled to the continual flow of the waters of such stream, so far, at least, as may be necessary for the beneficial use of the Government property."

Assuming that the Government has such rights, their extent, so far as my examination of the law shows, has not been determined. One view would be that enough water was reserved to fully irrigate all the land in the reservation. In the Conrad Investment Company case, supra, the Court said:

> "So it is of a reservation set aside for the exclusive occupancy of the Indians. The mere fact that a stream borders it in some portion of its contour does not relieve the waters thereof of the character of *publici juris* if they were such prior to the creation of the reservation, except as to such portion thereof as the proper needs of the Government may require for use upon the reservation for the benefit of the Indians."

The Court found what the present needs of the Government were, enjoined any use by others that would interfere with the Government's getting that amount, and gave the Government leave to apply for a modification of the decree at any time that it might determine that its needs would be in excess of the amount of water so designated, having previously said that further needs were a matter that should be left to the Interior Department, "as the exigencies may arise."

It might be held that the reservation of waters was limited to the fullest amount of water that could be used by the Indians for which the reservation was made and their reasonable increase, when living on allotments such as it has been the custom for the Government to make, and on the other hand a Court could well hold that the

Government must have the means of putting the reservation to the best and fullest use of the Indians for whose benefit the reservation was made, or possibly of other Indians and any possible increase of them, and so is entitled to enough water to irrigate all of the land. The circumstances surrounding the establishment of the reservation, including the treaties, if any, the executive order or act of Congress setting the land aside, the number of persons in the tribe, and whether the reservation was for the whole tribe or for several tribes, etc., etc., would have an important bearing upon this question.

3rd. Probably the squatters on the reservation who have constructed ditches and used the water, have valid water rights. The principle, which is a familiar one, is clearly stated by the Utah Court in a recent case as follows:

> "The exclusive right to use certain waters in this state has always been independent of and separate from the ownership of the land on which the water was used, or the ownership of any land. 11 Utah, 438; 40 Pac. 709; 30 L.R.A. 186. The authorities generally support this view. Weil Water Rights, etc., 2nd Edition par. 63. But the authorities are to the effect that even trespassers upon land acquire exclusive right to the use of water that is used either to irrigate such land or is used thereon for other purposes, and that such a right when once required, is paramount to the rights of the true owner or claimant of the land, and the water claimant, when he is dispossessed of the land, may divert and use the water elsewhere than on the land, if he can so divert or use it;" citing cases.
>
> Patterson vs. Ryan, 108 Pac. 1118 (Utah).

This seems to be the rule in Nevada. The Supreme Court of that State held, in Smith vs. Logan, 18 Nev. 149, that a trespasser could acquire a water right; that such

right did not pass with the land on which it was used when the true owner conveyed and that the trespasser could use his water right elsewhere.

In a case involving an Indian reservation, after proclamation by the United States for opening the lands but before actual opening, the Utah Court said:

> "We have no doubt that unappropriated public water on a reservation or on the public domain is subject to appropriation and may be appropriated for a beneficial purpose, though the appropriator has not when his application is filed with the State Engineer, a present right in or to the lands along the stream from which the water is proposed to be diverted, or in or to the lands proposed to be irrigated by him."
>
> Sowards vs. Meagher, 108 Pac. 1114.

Some of these squatters' rights are, I understand, 20 years or more old. They are now used on valuable bottom lands, and though they might be held junior to some or all of the Government's reservation water rights, they would be well worth acquiring. Mr. Oliver tells me that the United States Attorney for Nevada has been instructed to bring suits to eject these squatters, but I am not informed as to whether these suits have been brought, or if brought, their present status, as I did not see the United States Attorney after my visit to the Indian reservation.

From the standpoint of the water right situation alone, I think it would be well if these suits could be pressed, and it might be advisable to include in the action in ejectment, if that is permissible in Nevada, claims for mesne profits, or if not permissible, to bring separate suits for mesne profits with a view to the settling of such claims by taking over these water rights.

These Indian reservation water rights are important and should be established to the fullest extent because they

are senior and superior to most if not all the other rights on the river. There is some expectation in Nevada that the reservation is about to be thrown open to settlement. If this is contemplated, it would be well to consider the advisability of recommending to Congress, if this is still done by Congressional action, that the bill throwing open the lands expressly reserve for the use of the Truckee-Carson Irrigation Project, as it affects these lands, and the Indian allottees, all of the water rights that attach to the reservation as such, because without such a reservation the throwing open of the lands to settlement would restore them to the public domain without any peculiar water right privileges.

• • • •

EXHIBIT A-80240K

January 20, 1913

Commissioner of
Indian Affairs.

Sir:

In connection with the possible adjudication in the Federal Court of the waters of Truckee River, this office has been in conference with Mr. John M. Truesdell, Equitable Building, Denver, Colorado, who has been designated by the Department of Justice to take up the matter of this adjudication.

Mr. Truesdell's attention has been called to the fact that the rights of the Indians should be considered in this connection and he has been advised of the status of the Reservation in regard to its establishment as shown by the orders on pages (i11) and (i11) of Volume 1 of Laws and Treatice complied to December 1, 1909, issued as Senate Document 452, 57th Congress, First Session.

Please advise if there are any additional data in regard to the establishment of the Reservation which would be useful for Mr. Truesdell in connection with this suit.

This office has also advised Mr. Truesdell that according to the estimates of the Reclamation Service about (illegible) acres of land on the Reservation would be irrigable from the Pyramid Branch of the Truckee Carson Canal and that it is estimated that the total area on the reservation which was practicable of irrigation from the Truckee River would be (illegible) acres.

Please advise this office whether you have any further information on this matter in order that it may be taken up with Mr. Truesdell in the conference. It is expected

he will be with the representatives of the Reclamation Service in San Francisco in about two weeks.

If your office desires to be represented in such a conference it is suggested that you advise Mr. Truesdell at the address above.

Very respectfully,

Acting Director

PLAINTIFF'S EXHIBIT U-12

Admitted Nov. 24, 1975

DEPARTMENT OF JUSTICE
Washington, D.C.

Denver, Colorado, January 24, 1913.

Morris Bien, Esq.,
Acting Director Reclamation Service,
Washington, D.C.

Dear Sir:

I have your letter of January 20th and its enclosures and thank you very much for the same.

I have, of course, fully considered the Winters' case in connection with the Pyramid Lake rights, and although the Supreme Court in that case made a good deal of the contract or treaty feature, I agree with you that the result should be the same in the case of a reservation established by Executive Order. In a case with which you are doubtless familiar, the United States vs. Conrad Investment Co., 156 Fed. 123, District Judge Wolverton evidently did not regard the contract feature of the Winters' case as controlling.

I have examined and briefly considered the Act concerning the Pyramid Lake Reservation, which appears on page 499 of the Reclamation Manual to which you referred me. It will doubtless be claimed by our opponents that this Act restricts the reserved water rights to enough water for the allottees. I believe only about 612 Indians, including men, women and children, belong on this reservation, and as they seem to be restricted to 5 acres each, of the irrigated lands, it will be claimed that the reserved rights only amount to enough water to irrigate about 3060 acres. It seems to me that the gov-

ernment, in the suit to adjudicate the Truckee water rights in Nevada, which we hope to be able to bring very shortly, should claim the fullest sort of reserved rights for this reservation. If you have had occasion to consider the effect of this Act upon such rights, you would help me very much by giving me your view.

I thank you very much for the draft for a bill to be presented to the two legislatures, and I shall give this careful and prompt study and will write you about it. I have already written the Secretary of the Interior suggesting that the matter of obtaining legislation from Nevada be taken up immediately with Senator Newlands, with the idea of paving the way to present our bill when we have it drawn, and also of being sure to get the bill introduced in time.

The data you have furnished me and that you are getting about the reservation I think will be ample for the present purposes.

Very truly yours,

/s/ John F. Truesdell

EXHIBIT NO. A-11008B
Admitted Nov. 18, 1975

Hotel St. Francis
San Francisco, California.

February 1, 1913.

The Commissioner of Indian Affairs
Washington, D.C.

Sir:—

I have your letter of Jan. 23d forwarded me from Denver. The conference to which you refer has been going on here for two days and probably will be finished on the third of this month. It is not in connection with the proposed suit to adjudicate the water rights on the Truckee River in Nevada, but is solely in connection with the proposed use of the flood waters of Lake Tahoe for the Truckee-Carson project and its outcome would only affect the rights of the Government in connection with the Indiana Reservation, by those waters being stored in Lake Tahoe being used in part on the reservation as a portion of the Truckee-Carson project. This conference is for the purpose of bringing about a better understanding by the property owners around Lake Tahoe and the Congressmen representing California with respect to the Government intentions at Lake Tahoe.

I suppose under the circumstances Mr. Reed, Chief Engineer of the Indian Irrigation Service, would not care to be present if it were possible for him to reach here before the Conference closes. I therefore have not telegraphed him as I should otherwise have done, but have written him. A copy of that letter is herewith enclosed.

Respectfully,

/s/ John F. Truesdell

Hotel St. Francis
San Francisco, California.

February 1, 1913.

Mr. W. M. Reed,
Chief Engineer Indian Irrigation Service
526 Federal Building
Los Angeles, California.

Sir:—

I have received a letter of J .nuary 23d from the Second Assistant Commissioner of Indian Affairs. This letter was forwarded me from Denver and asked me to communicate with you in reference to a conference now being held in San Francisco. I take it from that letter that the Commissioner of Indian Affairs understood that this conference was in connection with a suit that is contemplated to adjudicate water rights on the Truckee River in Nevada and so desired your presence if possible, as such suit would affect the water rights of the Government in connection with the Pyramid Lake in the Indiana Reservation. The conference has been going on here for two days and will probably be concluded Feb. 3d. It is in connection with the Government plans in regard to storing water in Lake Tahoe and its purpose is to explain these plans to certain objecting property owners around the Lake and to the Congressmen of Californi, so if possible to being about a better understanding between the Government and all persons interested. I understand you are now in the Southwest and not expected to return to Los Angeles untilabout the fifth, and so could not attend this conference. I doubt very much however your desiring to attend as the water rights of the reservation are not involved.

It is my intention as soon as this conference closes to go to Nevada to take up this matter of bringing the suit above mentioned and before this suit is brought I should like very much if possible to have a conference with you

as to the rights in connection with the Indian Reservation, and the best method of protecting them in that suit. I have had in mind the necessityof securing as large a right for the reservation lands as possible, and having the reservation rights of the Government well in hand, have planned to pleas liberally so as to accomplish that purpose and at least not to foreclose any proper claim the Government can make.

In connection with this matter of the reserved rights of the Government it will probably be claimed that such rights have been largely surrendered by the provision of the Indian Appropriation Act for the fiscal year ending June 30th, 1905 which will be found on page 499 of the Manual of the Reclamation Service, Preliminary Edition, published April 1912.

It will be claimed that such rights stand only to enough water to irrigate five acres of land for each Indian, and as I understand that only about 612 Indians belong on the Reservation, such claim if successful would cut down the reservation water rights considerably. I should like very much to have your views as to this matter.

It is desirable that the suit above mentioned be commenced as soon as possible, so I should like to arrange a meeting with you, or if that cannot be conveniently done, to take these matters up by correspondence, as soon after you return to Los Angeles as convenient. If you plan to visit the Reservation soon I would meet you there, or at Fallon, or Carson City.

Please address me here, I will inform you of any change.

Respectfully,

/s/ John F. Truesdell

Special Assistant to the
Attorney General

EXHIBIT U-156

Admitted Nov. 24, 1975

DEPARTMENT OF JUSTICE

Carbon Copy For The Files

February 27, 1913

John M. Truesdell, Esq.,
Special Assistant to the Attorney General
Care United States Reclamation Service,
Fallon, Nevada.

My dear Mr. Truesdell:

I have yours of the 22nd instant, with inclosures, and am greatly pleased to have this renewed evidence of the successful progress of your work.

Regarding the matters of adjudicating the water rights of the Truckee and Carson rivers, or either of them, in Nevada, you are hereby authorized to commence and prosecute all such proceedings as may be necessary for the definition and protection of the rights of the government and of the settlers under the Truckee-Carson reclamation project. If, at any time, you should require the cooperation of the United States Attorney I do not question that he will gladly give it to you.

Respectfully,

/s/ Ernest Knaebel
For the Attorney General:
Assistant Attorney General

EXHIBIT NO. B-22

Admitted Nov. 19, 1975

Fallon, Nevada, March 5, 1913.

Governor Tasker L. Oddie,
Carson City, Nevada.

My dear Governor Oddie:

In response to your request I am glad to write you briefly about the Lake Tahoe bill recently passed by both houses of the Nevada Legislature and the suit just brought by the government to adjudicate Truckee River water rights.

As to the Lake Tahoe bill: When the government started the Truckee-Carson Reclamation Project in 1902 there was a large amount of water in the Truckee and Carson rivers not appropriated or used by anyone. This fact made possible the project, and it was with this then surplus water that the government designed to irrigate more than 200,000 acres of Nevada land. On starting the project this water was of course reserved and appropriated by the government.

To make the fullest and best use of the water so appropriated a large part of it must be stored in reservoirs. The Lahontan reservoir now half completed will take care of 290,000 acre feet, a part of which will come from the Truckee River, but this reservoir can not hold all of the Truckee River water appropriated by the government, so other storage has to be provided. There is no good reservoir site for this purpose in Nevada, and if there were, the building of the requisite dam, etc., would be expensive and add greatly to the cost of the project.

On the other hand Lake Tahoe offers an ideal storage opportunity. Its great area, 125,000 acres, makes it possible to store a large quantity of water there within a very narrow vertical range. As you know, the plan is to

regulate the lake levels within six feet, or between levels 6223.3 and 6229.3, or 6223.8 and 6229.8, and the lake in the past has been as high as 6231.26 and as low as 6223.05.

The bill in question gives the state's consent to the use by the government of the lake for this purpose. It is without prejudice to private or corporate existing rights in either the lake or the Truckee River, and I can see no way in which it could be otherwise than beneficial to any Nevada interest. The waters to be stored in the lake have already been reserved and appropriated by the government in Nevada, and even if this were not the case it is difficult to see how the State of Nevada as a practical matter could make any other use of this lake storage.

It seems to me to be wholly to the interest of the State to give such aid as it can to the government's plan to store these waters in the lake and use them to irrigate Nevada lands.

As to the adjudication suit, about which I talked with Mr. Kearney, the State Engineer, last November or December and frequently lately, my statement to the papers which appeared in yesterday's Nevada State Journal, a copy of which I enclose, briefly explains the matter.

In order at the same time to do justice to the water users under the project and not to encroach upon the rights of the other water right owners along the river, it is necessary for the government to know how much water it is entitled to take from the river and how much the other water right owners are entitled to take, so a determination of these rights is indispensable, and I believe as beneficial to those others as to the Reclamation project.

We believe that this determination must be made by a court, because only in that way, as we see it, can it have the requisite certainty and finality and be binding on all concerned, including the government itself. Thinking that a proceeding in court is necessary, the government natu-

rally brings that proceeding in the Federal Court which has jurisdiction over suits to which the United States is a party.

In coming to the above conclusion the proceeding before the State Engineer afforded by the Nevada statutes has been carefully considered and the interests of those who will be parties to the suit other than the government have been kept in mind and I believe safeguarded. I think the method of determination chosen will be beneficial to them and not unduly expensive.

As I see it, the two subjects of this letter are not related. The bill giving Nevada's consent to the government's plan to store water in Lake Tahoe and use it on the lands of the project will, if it meets your approval and becomes a law, have no effect upon the necessity of determining the relative rights in the Truckee River waters or the question of the wisdom of the government's choice of the tribunal to make this determination.

I hope this brief letter will answer the questions you had in mind.

Respectfully,

Special Assistant
to the Attorney General.

PLAINTIFF'S EXHIBIT U-16

Admitted Nov. 24, 1975

Copy-GPS

Denver, February 7, 1914.

Mr. D. W. Cole,
Project Engineer,
Fallon, Nevada.

My dear Mr. Cole:

I have your letter of the 4th inst. in which you ask which department (Interior or Justice) should bear the expense, amounting to $150.00 a month, of the employment of Mr. Osgood, who is needed in conection with the Truckee river water right adjudication suit.

The primary object of this suit is to determine the water rights in the Truckee river in Nevada, including those of the United States. Its secondary object is to prevent the wasteful use of water in the extensive farming region around Reno that at present obtains. If the suit is successful in this latter respect, it may save for the Truckee-Carson project as much as 200 second feet of water.

* * * *

Yours very truly,

/s/ John F. Truesdell

Special Assistant to the
Attorney General.

PLAINTIFF'S EXHIBIT U-18

Admitted Nov. 24, 1975

DEPARTMENT OF JUSTICE
Washington, D.C.

Denver, Colo., March 20, 1914.

Ernest Knaebel, Esq.,
Assistant Attorney General,
Washington, D.C.

Sir:

I have your letter of the 14th inst. EK WWD, 170876-1, about the further employment of Mr. Osgood, either by the Department of the Interior or the Department of Justice, because of his information as to the water rights of the Truckee River, concerning which he made an exhaustive survey last summer and fall, for the Reclamation Service, in order to gain information to be used in the government suit for adjudication of those rights. The letter from the Secretary of the Interior dated March 12th, was not enclosed. I expect to reach Nevada about the first of April, and upon doing so will report to you.

It would help me much in this matter if you could advise me as to the custom about paying for services of this kind. The suit is brought mainly in the interest of the Reclamation Service, though it should determine the rights of the Indian Reservation. We needed information about the water rights of the defendants, some 316 in number, who irrigate about 30,000 acres of land. The Reclamation Service undertook to get this information and employed for that purpose Mr. Osgood. The information gained has been largely reduced to writing, and drawing, in the form of maps and schedules, and these the Reclamation Service has. When these maps and schedules have been completed, the only reason that we need Osgood, as far as the suit is concerned, is as an interpreter of these

things, and also because of the knowledge of the situation that he has gained and has not reduced to writing. If Osgood is no longer employed by the Government, we shall have to get this information, as well as they can give it to us, from the Project Engineer, who of course was in charge of all of this work, and such of his assistants as are familiar with it.

I do not happen to know what facilities the Department of Justice has for investigating facts of this kind for the purposes of a Government suit instigated at the request of another department, or what authority it has for the employment of persons for such a purpose, or what the custom is concerning such employment. I have thought that possibly your office, from its larger experience, could tell me in a general way at least, what is customary in these matters. If you can give me this information, please send it to me at Fallon, c/o Reclamation Service, marking the letter "Hold until called for."

Respectfully,

/s/ John F. Truesdell

Special Assistant to the
Attorney General.

EXHIBIT NO. A-30767-H

Land-Allot.
41726-1909.
H V C.

Admitted Nov. 13, 1975

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN SERVICE
Office of
Superintendent of Irrigation
Salt Lake City, Utah

February 10, 1917.

The Commissioner of Indian Affairs,
Through Office of Spl. Agt. L. A. Dorrington,
Reno, Nevada.

Sir:

* * * *

The water rights of the entire Truckee River are now in the process of adjudication and every appropriator on the river has been made a party to the Suit which was instituted in behalf of the United States of America in the interests of the Truckee Carson Project of the Reclamation Service and Indians of the Pyramid Lake Reservation. It is hard to say just when this suit is to be settled. It has now been in the Court for many years. However, when the adjudication is accomplished the status of the water rights will be definitely established, and for the early priorities this will be a very valuable thing.

The value of a water right which depends entirely on appropriation and use is difficult to determine, and really has no definite priority until the stream has been adjudicated.

* * * *

Respectfully,

/s/ Henry W. Dietz

Superintendent of Irrigation

1SL-21-8.
HWD/H.

EXHIBIT NO. A-99008

Admitted Nov. 18, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
OFFICE OF THE CLERK

August 14, 1974

I hereby attest and certifiy on this date that the attached document is a true and correct copy of the original on file in "UNITED STATES OF AMERICA vs. ORR WATER DITCH COMPANY, et al" In Equity A-3, on file in my office, and in my legal custody.

Description: Letter to Honorable E. S. Farrington from R. G. Withers, dated August 7, 1918.

JOHN A. PORTER
Clerk

By /s/ [Illegible]
Deputy

EXHIBIT "B"

DEPARTMENT OF JUSTICE

OFFICE OF THE UNITED STATES ATTORNEY
District of Nevada

Reno, Nevada, August 7, 1918.

Hon. E. S. Farrington,
Judge of the U.S. District Court,
Carson City, Nevada.

My dear Sir:—

I understand from your letter of the 1st ult., that the precise point as to which you are dubious is whether we are not asking for an order which is not proper until the defendants have at least been notified of the issues inter se which they are expected to meet.

We do not contend or believe that a court of equity can make a decree in favor of one co-defendant as against another which is not preceded by a sufficient notice to him of the issues which he is expected to meet.

We do contend that the procedure we have followed is sufficient to notify each defendant of the adverse rights of each other co-defendant which he is expected to meet, —this was our purpose in adopting it, —and that if the order is made, the decree will be binding upon and between all the users, whether plaintiff or defendants, from this common water supply. This suit will have failed in a large measure if it does not result in a final settlement of the rights and priorities of all water users, but shall leave these rights for further litigation with a multiplicity of suits.

Our arguments and contentions may be summarized under three heads:—

A. Where, as in a water suit of this kind, a single *res* e.g. water supply, is to be divided and apportioned between a number of persons, each of whom claims rights adverse to, but contingent and interdependent upon, the rights of others, equity will not dispose of this res by piecemeals, but as a whole; which means the determination of the rights and priorities of each user.

B. That in order to determine each of these adverse, but contingent and interdependent rights, a court of equity has the inherent power to bring in as parties every claimant of such rights; and this necessarily means that each such claimant must be so placed relative to the suit that the decree shall be final as to him.

C. The proper method of procedure by which this is to be accomplished.

As illustrating head A, and the development of the rule in water cases, we cited:—

Union M.&M. Co. v Dangberg, 81 Fed. 73.

Ames Realty Co. v Big Indian Co., 146 Fed. 166.

Rickey L. & C. Co. v Wood, 142 Fed. 22.

Washington State Sugar Co. v Sheppard, 186 Fed. 233, 235-6.

Bliss v Grayson, 24 Nev. 422, 452.

Ramelli v Sorgi, 38 Nev. 552.

Hough v Porter, 51 Oregon 315; 95 Pac. 732, 98 Pac. 1083.

Under head B, we cited the above water cases, and contended that, since the nature of this case is such that the rights and priorities of each defendant as well as of the plaintiff must be proved and litigated, and in actual practice such rights are always proved and litigated; and since, where adverse rights of defendants are actually litigated though not pleaded, the defendants will be bound by the decree inter se;

Lord Eldon in Chamley v Lord Dunsany, 2 Sch. & Lef. 718.

1 Beach Modern Equity Practice, Sec. 430, page 449.

Corcoran v C.&O. Canal, 94 U.S. 741, 24 L.Ed. 190.

it must follow that the court has the power to make such order in advance of the hearing, under proper notice, as will put the issues in such shape as to pave the way for such proper final decree as may be rendered and to inform each party thereof, so that he may present his evidence accordingly.

Under head C, while under the former equity practice every cross bill between defendants must be germane to the subject of the original bill, we called attention to the distinction between such cross bills as raise issues which (1) must, and (2) need not, be determined in order to protect fully the plaintiff's rights, and that in the second group, it is optional with the defendant whether he will interplead a co-dendndant, while in the first group, the court might order him to do so; and we cited:—

1 Beach Modern Equity Practice, Sec. 432, page 451.

Hough v Porter, supra.

We also called attention to the fact that while, under the old practice, in case of a crossbill against a co-defendant, a subpoena was served, under present Rule 31, no subpoena is to be served, but the counterclaim is to be served upon the co-defendant or his solicitor by delivering a copy; and that Rule 31 also provides that if the counterclaim is one which affects the rights of other defendants, it *shall* be served on them; so that now, a defendant claiming adverse rights against a co-defendant is required to serve a copy of his counterclaim whether he wishes to do so or not, and the jurisdiction of the court does not depend upon his compliance, or non-compliance with the Rule.

The defendants were fully and properly notified. Our application was filed on May 29, 1918, and an order was made setting it for hearing on July 1, 1918; and before June 8th, the date mentioned in the order of setting, defendants or their solicitors were served with notice of the hearing, a copy of the order and a copy of our application.

Our application, with a copy of which they were served, stated that its purpose was to obtain an order of which the effect would be to put each defendant, as to co-defendants with adverse rights, in the same position as though these counterclaims had been served on him and he had replied thereto. The counterclaims are on file with the clerk and open to inspection and examination. At the hearing of our application there was no suggestion that any defendant was not fully informed of the purpose of the application and what its effect would be if the order was made; but on the contrary, it was objected to because it would have this effect.

In support of our contention that this notice was sufficient and was all that was required, we called attention, as illustrative of the general rule, to the case of Hough v Porter, supra, 95 Pac. 732, 98 Pac. 1083.

In that case, the court made an order that all the users from the stream be made parties, either as plaintiffs or defendants, and directed among other things that all parties so appearing as defendants should "answer to the complaint and interplead as to their co-defendants or any of them", (95 Pac. 733); and on pages 750-751, the court said:—

"It is necessary, however, in such cases, that sufficient notice be given the co-defendant against whom the relief is sought. In Tucker v St. Louis Life Ins. Co., 63 Mo. 588, 595, it is remarked that in that state "it has not been the practice to issue process in such cases; but it has always been customary to afford ample time to a co-defendant to answer as to the relief sought—a time which

is generally fixed by the court's order to that effect. And if, in the absence of any statutory rule, we are to be governed by parity of reasoning deduced from cases where relief is sought by petition, at least the same time and opportunity to plead should be granted where relief is sought by an answer in the nature of a cross-bill, as when prayed for by petition." But from Pomeroy, Co. Rem. Sec. 808, cited with approval in Nevada Ditch Co. v Bennett, at page 83 of 30 Or., page 472 of 45 Pac. (60 Am. St. Rep. 777), it would appear that service of a notice of some substantial nature would be essential to jurisdiction in such cases. As the notice required in such cases is not pointed out by the Code, it would seem that since there exists the right to affirmatively set up in the answer the matter constituting the cross complaint, or counterclaim, in place of by an original bill, as in the chancery practice, the defendant in so doing, to all intents and purposes, places himself in the position of a plaintiff in respect to his co-defendants, with the result that the issue and service of a summons accompanied by a copy of the answer in a similar manner to that provided for a plaintiff in an original proceeding would be sufficient. In the case at bar, however, the order of the court, a copy of which was directed to, and served upon, each, required that all should appear within a time there specified, and plead and interplead with respect to each other as their several interest might appear, which was in effect the same, and served the same purpose, as a summons, and was sufficient to require the appearance and interpleas demanded. In that respect the order having directed the interpleas between each, only such proceedings were required after the service thereof, in reference to serving copies of answers, etc., as were required by the rules of the district in which the suit was brought." etc.

Rule 31 of this Court makes it obligatory on a defendant to serve his counterclaim upon co-defendants claiming rights adverse to him, and the jurisdiction of the court to determine such counterclaims arises out of the Rule and

not out of the consent or the act of the defendants, and we are asking that the defendants be given the benefit of a compliance with the Rule, although they have not complied with it, and although their day of grace is now already past, and we feel confident that the court has the power to do this in order that equity may be fully administered without regard to technicalities.

The service of these counterclaims, and filing of proof of service, and the filing and serving of replies would accomplish no beneficial end not accomplished by the order; and in this case, it would entail useless labor and expense, and would encumber the record with needless papers, and might indefinitely delay the trial of the case on the merits.

The effect of this suit will be to settle the substantial rights of every users, and we believe that equity will not favor permitting those rights to be jeopardized by any technicality or deficiency in pleadings.

I am enclosing a copy of Judge Kent's decree in the Phoenix case which I borrowed from Mr. Truesdell.

I have delayed answering your letter until I could get in touch with co-counsel who have had more experience than I in handling water suits of this kind, and I take the liberty of quoting from a letter received this morning from Mr. Truesdell:—

"It might be well to emphasize the practical side of the matter if you can along the following lines.

In all jurisdictions where there are no statutory proceedings for accomplishing a general adjudication, such adjudications are accomplished as a matter of fact. That is so in California. It is so in Arizona, and it is so everywhere. Whenever a suit in the nature of a suit to quiet title is filed, the result is very rarely an adjudication between merely the plaintiff and the defendants, but the decree binds all and in every relation; also, almost, if not

absolutely without exception, this is not done after a complete series of pleadings between the defendants. Just how it is and how it can properly be dispensed with are of course the questions here. The books do not help us much because many of these cases are not appealed and none of them go off ~~at~~ on that point.

In Arizona the custom is to file a bill practically such as we filed. In some cases the bill asks that the defendants be required to plead among themselves. It does not seem to me that this is material. The whole point is that this kind of a suit requires a certain kind of treatment and decree. I enclose a complaint in a comparatively recent suit in Arizona: Benson v Allison. I do not know whether this has reached a decree yet or just how the matter that we are interested in was treated as far as orders and cross-complaints are concerned. See Montezuma Canal Co. v Smithville Canal Co., 11 Ariz. 99, 89 Pac. 513. That I think was a case of the same character, but I do not know that the report will help us any.

He adds that it seems to him that the results ought to be acomplished as a practical matter.

Yours respectfully,

/s/ R. G. Withers

I may add that if this order is made, the defendants will, as a practical matter, be more favorably situated than if they were required to interplead and reply; because, before any defendant could safely draft his reply, it would be necessary for each defendant to examine each counterclaim, and inform himself in advance of the rights and priorities of each other defendant, while under the order, he may safely rely upon the facts as they may be developed at the trial.

EXHIBIT A-99037

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

OFFICE OF THE CLERK

August 14, 1974

I hereby attest and certify on this date that the attached document is a true and correct copy of the original on file in "UNITED STATES OF AMERICA vs. ORR WATER DITCH COMPANY, et al" In Equity A-3, on file in my office, and in my legal custody.

Description: Opinion of the Court, filed September 18, 1918.

JOHN A. PORTER
Clerk

by: /s/ [Illegible]
Deputy

IN THE DISTRICT COURT
OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ORR WATER DITCH COMPANY, *et al.*,
Defendants.

OPINION

Filed September 18th, 1918

/s/ J. Edwards
Clerk

IN THE DISTRICT COURT
IN AND FOR THE DISTRICT OF NEVADA

No. A-3

THE UNITED STATES OF AMERICA
Plaintiff,

vs.

ORR WATER DITCH COMPANY, ET AL.,
Defendants.

WILLIAM WOODBURN,
R. G. WITHERS,
For Plaintiff.

COLE L. HARWOOD,
CHENEY, DOWNER, PRICE & HAWKINS,
BENJAMIN CURLER,
For certain Defendants

This suit was brought by the Government against a large number of persons and corporations claiming the right to use the waters of Truckee River. Plaintiff prays that a "writ of subpoena issue to each and all of said defendants, and that they be required to answer this complaint and set up fully their claims to the waters of said river and its tributaries. That the court by its decree determine the relative rights of the parties hereto in and to the waters of the said river and its tributaries in Nevada, both natural flow and flood waters, to the end that it may be known how much of said waters may be diverted from said river by the parties hereto and for what purposes, where, by what means of diversion, and with what priorities. That the court decree to the United

States the water rights hereinabove set forth and claimed by and for the United States, and quiet its title therein and thereto, and enjoin said defendants and each of them from interfering therewith, and provide such other means for the carrying out of its decree herein as may be proper; and that the United States have such other, further, and different relief as to the court may seem just."

Plaintiff bases its claim on an appropriation of water for the Pyramid Lake Indian Reservation, and also on a later diversion for the Truckee-Carson reclamation project. Substantially all the defendants have filed answers and counterclaims. The matter now comes before the court on plaintiff's petition for an order, in substance and effect, as follows:

> "That on account of the nature of this suit as above described, of the great number of defendants herein, running well into the hundreds, and because of the unnecessary expense, inconvenience, and voluminous additions to the record that would otherwise occur, it is obvious that the ends of justice and equity will best be served by an order of the court to the effect that such affirmative pleadings as have been or may be filed by said defendants, and each or any of them, having for their purpose the presentation of the claims of said defendants to waters or water rights, whether the same be designated counterclaims, cross bills, cross-complaints or otherwise, shall be deemed to be directed against each and every other defendant herein when adverse to or affecting the claims made by them, as well as against the plaintiff, and in turn to be properly denied by them and each of them; that copies of such pleadings will not be required in any instance to be served upon any of said defendants, nor shall replies or answers to such pleadings be required to be made or filed, or served by copy, upon any of said defendants; that the testimony and evidence adduced under any of the affirmative pleadings

aforesaid, in so far as the same shall be adverse to or affect the claims of other or others of said defendants and be admissible to that end, may be met by the introduction by them or any of them of other admissible testimony and evidence, whether the same be in support of denials deemed to be made as above ordered, or of affirmative character properly within the scope of replies or answers in this order not required to be made; all in the same manner and to the same effect as though proper and formal pleadings by each of said defendants were duly made and filed and served upon every other of said defendants; that the issues made by the evidence and proofs adduced by defendants, as aforesaid, whether the same be offered under affirmative pleadings of said defendants or any of them, or denials deemed to be made, or otherwise, as hereinabove provided, and the rights and claims of said defendants inter se, shall be determined and adjudicated in this cause, and decree entered by the Court in the same manner and to the same effect as though all usual pleadings had been filed and service of copies thereof made."

Notice of plaintiff's application for the above-mentioned order was duly served on all the defendants, of whom at the hearing of forty-four appeared by Cole L. Harwood, their solicitor; twenty-five by Benjamin Curler, their solicitor, and twenty by their solicitor, S. S. Downer. Each of these defendants opposed the granting of the petition. Each defendant appearing by Mr. Curler asked that the court decree to him the water right in his answer and counterclaim set forth. Each defendant represented by Mr. Downer, with one or two exceptions, asked a decree that his rights be established and quieted, and that all parties to the action be restrained and enjoined from interfering therewith. There was no appearance on the part of other defendants.

FARRINGTON, District Judge (After stating the facts as above): If plaintiff is entitled to a decree, it is entitled to one which can be effectively enforced by this court. The suggestion that relative rights of the defendants should be left to the determination of the State Engineer, or abide the result of future actions in this, or some other court, when defendants are pleased to litigate among themselves, cannot be entertained. Neither would it be proper to suffer an ineffectual decree for no other reason than defendants' failure or disinclination to plead among themselves.

If plaintiff at a point on the Truckee River above the dams, ditches and uses of the defendants, and of each and all of them, has made its appropriations and diversions prior to the date of any appropriation by any of the defendants, the latter might well be left to litigate their rights among themselves, and at their convenience; but the conditions in the present case are peculiar. Many, if not all the defendants, have asked affirmative relief against the plaintiff; twenty or more have prayed for a restraining order, not only against the plaintiffs, but against some or all of the defendants; and it is worthy of note that these twenty are among those who are protesting against the proposed order.

In each answer which I have examined, the defendant demands a decree that he is the owner, and entitled to all the waters used and appropriated by him as set out in his pleadings.

Plaintiff asks a decree fixing the relative rights of the defendants, quieting its own title, and restraining defendants from interfering therewith, and that such other means for carrying the decree into effect as may be proper, shall be provided.

The most cogent and weighty reason for granting the petition, however, grows out of the location, date and character of plaintiff's appropriations. It is alleged in several of the answers that ninety per cent of the water

used by defendants is taken from the river above the Derby dam, where the diversion for the Truckee-Carson project is made. Plaintiff's appropriation for the Pyramid Lake Indian Reservation is probably the lowest, as well as one of the earliest, on the river. Furthermore, plaintiff claims the right to store large quantities of water in Lake Tahoe, at the source of the river, and to use on the Truckee-Carson project all the waters that flow into or from the lake, the right to the use of which by others was not lawfully acquired prior to July 2, 1902. As these stored waters in order to reach the land for which they are claimed, must traverse the Truckee River to the Derby dam, and in so doing pass nearly all of defendants' diversion dams, canals, and ditches, and as plaintiff's dams and headgates at the lake will, if its claims are well founded, control at all seasons of the year the amount of water flowing from Lake Tahoe into the Truckee River, it is clear that any decree rendered in this case which is susceptible of practical and effective enforcement, if plaintiff is entitled to a decree, must show how much water each defendant is entitled to divert, for what purpose, where, by what means, and with what priority. A decision leaving such rights undetermined would probably operate as a denial of justice to plaintiff.

Hough v. Porter, 95 Pac. 732, 748;

Ames Realty Co. v. Big Indian Mg. Co., 146 Fed. 166, 172-3.

It was proper to join in this case as defendants all who assert interests in the flow of the Truckee River.

Whited v. Cavin, 105 Pac. 396, 401.

Kinney on Irrigation, Sec. 1545.

Equity rule 37 declares that any person may be made a defendant who claims an interest adverse to the plaintiff, or whose presence is necessary or proper to a complete determination of the cause. It is peculiarly the duty of a

court of equity, in so far as possible, in every case over which it has acquired jurisdiction, to settle all controversies among the parties touching the subject matter of the action, in order to avoid a multiplicity of suits.

Union M. & M. Co. v. Dangberg, 81 Fed. 73;

Rickey Land & Cattle Co. v. Wood, 152 Fed. 22.

Under the old practice, the counter demands of a defendant against a plaintiff or a co-defendant, as a rule were brought into the case by a cross-bill, and it was well settled that such a bill in a proper case could be interposed in order to enable the court to completely adjudicate all differences growing out of the transactions set out in the original bill. Under the present equity practice, the same end can be accomplished by setting out counter demands in the answer.

Equity rules 30 and 31 provide that the "answer *must state* in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit."

"If the answer includes a set off or counterclaim the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge."

"If the counterclaim is one which affects the rights of other defendants, they or their solicitors shall be served with a copy of the same within ten days from the filing thereof."

It is obvious from the language quoted that the counterclaim referred to must be one existing against the plaintiff or a co-defendant, and it must be germane to the cause of action set out in the bill.

I am not overlooking the further provision of Rule 30, which also permits the inclusion in the answer of any set off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him.

The idea to which I wish to direct attention is that two classes of counterclaims are recognized: those "arising out of the transaction which is the subject-matter of the suit" *must* be stated in the answer, whether they be against the plaintiff or a co-defendant. The language of the rule is mandatory, and it is thought that such a counterclaim, if there be one, is waived if the defendant fails to set it up.

Simpkins Eq. Pr. p. 447;

Portland Wood Pipe Co. v. Slick Bros. Cons. Co., 222 Fed., 528, 530;

Knupp v. Bell, 243 Fed. 157, 161;

Ohio Brass Co. v. Hartman Electrical Mfg. Co., 243 Fed. 629, 632.

So far as the record shows, no copy of any counterclaim has been served on any one of the defendants. The ten days within which such service could be made has long since expired. Assuming that each defendant has, in consequence, lost the right to obtain affirmative relief against his co-defendants, it does not necessarily follow that plaintiff is debarred from any part of the full relief to which it might otherwise be entitled, or that each defendant is not entitled as against the plaintiff, to have his water right fully determined.

In Nevada Ditch Co. v. Bennett, 45 Pac. 472, 477, cited by the objecting defendants, after the cause had reached the appellate court, one of the defendants asked that the "especial rights of each of the defendants touching the question of priority of their several appropriations" should be determined. It appeared that this defendant had alleged generally that his claim was prior and superior to that of any other defendant, and had asked affirmative relief. Each defendant had controverted the rights of the plaintiff, and set up his own claim, but no defendant had

controverted the rights of any co-defendant. The case was tried on the theory that there was no contention among the defendants, and no countervailing testimony among them was introduced. The Supreme Court, while admitting that it would have been much better if the correlative rights of all parties had been settled, and that such an end could have been accomplished if the pleadings and proof had been so formulated, declared that the condition of the case left it powerless to grant the remedy demanded.

The distinguishing feature of the Oregon case is that it is the defendant who is refused affirmative relief, because he had failed in his pleadings to controvert the claims of his co-defendants, or on the trial to offer countervailing testimony.

The plaintiff here has asked a determination of the relative rights of the parties, and as against the plaintiff each defendant has set up his claim, and asked that his rights be fixed. The plaintiff claims extensive appropriations at the Derby dam, at the head, and also at the lower end of the river. The rights thus claimed are affected, more or less, by every diversion or claim made by any of the defendants.

Under the rule in Miller v. Dondero, 73 Pac. 583, the present complaint, answers and counterclaims are sufficient, as pleadings, to support an effective decree in behalf of the plaintiff; in any event, there can be no question as to the power of this court, to order such further pleadings in the nature of a cross-bill, as may be necessary to a complete determination and enforcement of plaintiff's rights.

Morgan's Co. v. Texas Central Ry., 137 U.S. 171, 200;

Shipman on Eq. Pl., p. 307;

1 Paige Modern Eq. Pr., Sec. 432;

6 Standard Ency. Proc., p. 284.

In 2 Daniell's Ch. Pl. & Pr. (6 ed.) p. 1550, it is said:

> "A cross-bill may also be directed to be filed, when, at the hearing of a cause, it appears that the suit already instituted is insufficient to bring before the Court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens where persons in opposite interests are co-defendants: so that the Court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, the Court will direct a bill to be filed, in order to bring the rights of all the parties fully and properly before it."

In Sims v. Burk, 109 Ind. 214, a decree was reversed because under such conditions, the defendant was not required to file a cross-bill.

It is imprudent, perhaps impossible, to determine in advance of a decree what its effect may be; but it is certain, as I have said above, that in disposing of the present case the appropriation of each defendant must be investigated and determined.

The rule is well settled, in reason and by authority, that where an issue has been fairly tried and determined, though not formulated in the pleadings, as between the co-defendants, the decree concludes and estops all parties to the cause who have actually joined in litigating the issue, or who have had an opportunity to say and prove all they can in relation to it.

At section 430 in his work on Modern Equity Practice, Mr. Beach says:

> "In chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may

be passed upon and decided, although they are not put in issue by the pleadings and no adversary proceedings are had; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree."

In Black on Judgments, Vol. 2, p. 738, it is said:

"The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleading, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of the court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated."

In Corcoran v. Chesapeake, etc. Canal Co., 94 U.S. 741, the Canal Company had issued three series of bonds secured by as many mortgages on its property. The first was given to the State of Maryland; the second to the State of Virginia, and the last to bondholders represented, in part at least, by Corcoran. Corcoran brought suit in behalf of himself and other bondholders on the last series of bonds, to enforce the payment of coupons of interest. The Canal Company and the State of Maryland were made defendants. Corcoran claimed that Maryland had waived her prior lien upon the revenues of the company, but it appeared that some time before the State of Virginia had also brought a similar suit to collect interest due on the bonds held by her, and in that litigation had made the Canal Company, the State of Maryland and Corcoran, defendants. Virginia claimed a preference, and obtained a decree. Corcoran contended that inasmuch as no issue was raised between the State of Maryland and the bondholders represented by himself in the pleadings in the first suit, and no adversary proceedings had been had as between them, the alleged waiver was still an open

question. The Supreme Court, in passing on his contention, said:

> "It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.
>
> "The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of distribution of the net revenue of the canal company, and that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree. And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation."

To the same effect see: Fletcher Eq. Pl. & Pr., Sec. 893.

My attention has not been directed to any authorities which convince me that an order of court can be substituted for personal service of the counterclaims on the various co-defendants, or on their solicitors. If the defendants appear at the trial, and contest the claims of each other, they will be concluded by the decree adjusting their relative rights; but if they ignore the counterclaims among themselves, a decree attempting to determine their

rights *inter se* will be based on the order that each counterclaim against the plaintiff is to be regarded as directed against each co-defendant, and that it will be considered duly served and properly denied.

How can it be said that an order of court is equivalent to a pleading, process and service of process? One who has never been served with a complaint or process, cannot be required under the equity practice, to answer.

In Hough v. Porter, 95 Pac. 750, it is said in such a case service of a notice of some substantial nature is essential to jurisdiction. The Hough suit originally was instituted by two plaintiffs against one defendant. After hearing the evidence and the argument of counsel, and finding it impracticable to make a complete determination of the controversy among the three parties as to the waters of Silver creek, the court ordered that all persons interested, naming them, be brought in and made parties to the suit; that all parties appearing plead, either as plaintiffs or defendants, and that all appearing as defendants should answer to the complaint, and interplead as to their co-defendants, or any of them. The Supreme Court of Oregon held that this order as to those who were duly and regularly served therewith, had the same effect as a summons, and that in order to confer jurisdiction to determine the rights of each and all who had thus been served, only such further proceedings would be necessary as were required by the court rules in reference to serving copies of answers, etc.

Rule 31 requires that co-defendants affected by a counterclaim *shall be served with a copy of the same within ten days from the filing thereof*, unless a longer time be allowed by the court or judge.

It is well settled that one defendant cannot have a decree against a co-defendant without a cross-bill, with proper prayer and process or answer, as in an original suit.

Smith v. Woolfolk, 115 U.S. 143, 148;

Commercial Bank of Augusta v. Sanford, 103 Fed. 98, 104;

Lowenstein v. Glidewell, 15 Fed. Cas. No. 8575;

Walker v. Byers, 14 Ark. 246, 261;

Grobe v. Roupe, 33 S.E. 261;

Pomeroy's Code Rem., Sec. 806;

6 Standard Ency. Proc. 287;

16 Cyc. 211, 334;

5 Ency. Pl. & Pr. p. 658.

In Street's Fed. Eq. Pr., Sec. 1065, it is said:

> "The service of process is necessary to bring the defendant in the cross bill properly before the court. At first blush it might seem that the court could safely assume jurisdiction over the defendant in the cross bill (being the plaintiff in the original bill or a co-defendant therein) on the ground that he is already in court in the main cause. But this idea is not countenanced for the very good reason that it would lead to abuses. A person against whom any sort of judicial proceeding is set going has a right to be informed of that fact by the due service of process, and the court cannot exercise its judicial power over him until service of process has first been obtained. This rule applies to proceedings by cross bill as well as to proceedings by original bill. For instance, the defendant in a cross bill can not, as a general rule, be brought in by mere publication."

I am confident that the pleadings as they now stand, without more, are sufficient to support an enforceable decree, determining, as against the plaintiff, the priority, quantity, use and location of the appropriation claimed by the several defendants. It is desirable that the present

litigation shall finally settle all controversies over the waters of the Truckee River; unless on the trial, defendants contest the claims of each other, the validity of a decree obtained without service of the counterclaims and replies as between the defendants themselves, will be open to question.

The service of the counterclaims and the making and service of replies, would certainly entail an enormous expense and trouble, which must be avoided if possible. In my opinion, counsel can, by stipulation, avoid this expense and trouble, and yet reserve exceptions as ample and effective as though such an order were actually made and enforced. If such stipulations are not made, appropriate orders will, on application of the plaintiff, be entered, directing the service of counterclaims and replies. The proposed order, with some modifications, will be made; for the present, however, service will not be ordered.

An order will be entered in accordance with the foregoing opinion.

EXHIBIT B-468

IN THE DISTRICT COURT
OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA

In Equity Court No. 13

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ORR WATER DITCH COMPANY, *et al.*,
Defendants.

ORDER FOR ADJUDICATION OF RIGHTS AND CLAIMS OF DEFENDANTS INTER SE

On the first day of July, A.D. 1918, this cause came on regularly to be heard upon the plaintiff's petition for an order for an adjudication of the rights of defendants inter se; * * * and the said petition having been considered by the Court and having been argued and submitted by respective counsel on briefs thereafter to be filed and the Court being now fully advised in the premises, and it appearing that said petition was filed in this Court on the 29th of May, A.D. 1918, and that thereafter and on said day the Court made an order setting said petition for hearing on the 1st day of July, A.D. 1918, and ordering that, not later than the 8th day of June, A.D. 1918, a copy of said order and petition be served on the defendants herein who have appeared and filed counterclaims, by delivering the same to them or to their solicitors, and that such service was so made before the 8th day of June, A.D. 1918, as appears by an acknowledgement of service thereof by the solicitors of the respective defendants and by the affidavit of R. G. Withers herein filed, and that all parties hereto, whether

plaintiff or defendants, claim relative rights to the use of the water of the Truckee River and its tributaries, and that it is necessary, as against every other party herein whether plaintiff or defendants, to determine the right of each user or claimant of water from said common source of supply in order to determine the rights of the other users and claimants therefrom; that there is a large number of defendants herein each claiming rights to the use of said water separate from and adverse to the rights both of the plaintiff and of all other defendants herein, and that service by each defendant of his counterclaim upon each other defendant and the replies thereto would entail a voluminous addition to the record and a multiplicity of pleading, and hardship and expense upon the defendants, all of which can be avoided by a proper order herein:

NOW THEREFORE IT IS HEREBY ORDERED that such affirmative pleadings as have been or may be filed by said defendants, and each or any of them, having for their purpose the presentation of the claims of said defendants to waters or water rights, whether the same be designated counter-claims, cross-bills, cross-complaints or otherwise, shall be deemed to be directed against each and every other defendant herein when adverse to or affecting the claims made by them, as well as against the plaintiff, and in turn to be properly denied by them and each of them; that copies of such pleadings will not at present be required in any instance to be served upon any of said defendants, nor shall replies or answers to such pleadings be required to be made or filed, or served by copy at present upon any of said defendants; that the testimony and evidence adduced under any of the affirmative pleadings aforesaid, insofar as the same shall be adverse to or affect the claims of other or others of said defendants and be admissible to that end, may be met by the introduction by them or any of them of other admissible testimony and evidence, whether the same be in support of denials deemed to be made as above ordered,

or of affirmative character properly within the scope of replies or answers in this order not required to be made; all in the same manner and to the same effect as though proper and formal pleadings by each of said defendants were duly made and filed and served upon every other of said defendants; that the issues made by the evidence and proofs adduced by defendants, as aforesaid, whether the same be offered under affirmative pleadings of said defendants or any of them or denials deemed to be made, or otherwise, as hereinabove provided, and the rights and claims of said defendants inter se, shall be determined and adjudicated in this cause, and decree entered by the Court in the same manner and to the same effect as though all usual pleadings had been filed and service of copies thereof made.

By the Court

/s/ E. S. Farmington
Judge

Sept. 17, 1918

EXHIBIT NO. U-88

Address reply to:

The Attorney General
and Refer to
Initials and Number

DEPARTMENT OF JUSTICE
Washington, D.C.

528 Federal Building
Los Angeles, California
May 22, 1919

Mr. F. E. Weymouth
Chief of Construction
U. S. Reclamation Service,
Denver, Colorado

My dear Mr. Weymouth: —

I send to you herewith a copy of a letter that I have just written to the Commissioner of Indian Affairs about the quantity of land for which we expect to claim an early water right on the Pyramid Lake Indian Reservation in Nevada, all in connection with the Truckee River Adjudication suit. The letter explains itself. It is written so as to be sure that we are on the right track as far as the Indian Service is concerned, and I am sending copies of it to you so as to be sure that there is nothing in our plans in this regard that is not correct in case there actually is any conflict of interest between the two Bureaus. As explained in the letter, it seems to me that there is not.

Very truly yours,

JOHN F. TRUESDELL
Special Assistant to
the Attorney General

Encl.

528 Federal Building,
Los Angeles, California,
May 22, 1919.

Commissioner of Indian Affairs,
Washington, D. C.

My dear Mr. Commissioner: —

The case of the United States v. Orr Water Ditch Co., affecting the Pyramid Lake Indian Reservation in Nevada, we expected to have go to trial on the 19th of this month, but complications were met, which made this impossible. However, it is expected and hoped that the trial will begin early in June, or even before. Mr. Morton of the Reclamation Service, who is associated with us in the trial of the case, and Mr. Withers, who is in local charge, conferred with me here in Los Angeles last week, and among other things we considered the acreage to claim water for on the Indian reservation.

You will remember that by the Act of April 21, 1904, (33 Stat. 189), Congress authorized the Secretary of the Interior to reclaim, utilize and dispose of any lands in the Pyramid Lake Indian reservation, which may be irrigable by the works of any reclamation project. This legislation contains the proviso that there shall be reserved for and allotted to each of the Indians belonging on the reservation five acres of the irrigable lands, that the remainder of the irrigable lands in the reservation shall be disposed of to settlers under the provisions of the Reclamation Act and that there may be added to the charges required to be paid under that act by the settlers upon the unallotted Indian lands "such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of unallotted lands in said reservation before reclamation". The act further provides that the sum that the settler shall pay over and above that required for reclamation shall be placed to the credit of the Indians.

We have considered this legislation in connection with the question of the amount of water that the government ought to claim in this suit was reserved for this reservation under the doctrine of the Winters case when the reservation was made. Whatever was reserved of course would be a very early, or perhaps the first, right in the river because the reservation was formally made by Executive Order in 1874 and was set apart as a practical matter some years before that and always had been used and occupied by the Indians. The plans of the Reclamation Service contemplate the inclusion of about 19,000 acres of the bench lands of the reservation in the reclamation project, and under this act it is of course clear that each Indian belonging on the reservation is to have five acres of this land. It also seems clear that under the doctrine of the Winters case the original Indian withdrawn water right would attach to each of these five acres that the Indians are to have, but that the rest of the 19,000 acres which will be irrigated by the works of the project will have to depend for their water right upon the general project water right.

The next question is what other lands on the reservation, if any, are entitled to the original Indian water right, and we think that such lands amount to about 2,400 acres that lie along the Truckee river and compose the so-called delta. These are, as I understand it, practically the only lands on the reservation that are susceptible of irrigation outside of the bench lands that are included in the Reclamation project and a few farms further up the river that are occupied by the squatters that the government is now trying to dispossess. These 2400 acres are now to a very considerable extent being farmed by the Indians and they also embrace the agency and school property. The theory that we have been going on is that the Indians, who number about 600, will be given the aggregate 3,000 acres of the lands within the Reclamation project, and also will be allotted each his share of the lands comprised

in this 2400 acres in the delta. We also have in mind that the government will probably reserve grounds for administrative buildings and possibly a school farm or something of that sort.

From the above you will see that our plan is to claim a very early water right under the doctrine of reservation, as established by the Winters case, for about 5400 acres. All this has been carefully discussed by Mr. Withers with the Superintendent of the reservation and I have no doubt has been called to your attention, but to be sure that our plans in this respect meet with your approval, and to give the opportunity to make any suggestions or give us any directions that you have, I am writing this letter. Also I am sending a copy of it to Mr. Reed and Mr. Dietz. Furthermore, I am sending a copy to Mr. Weymouth, the Chief of Construction of the Reclamation Service, so as to be sure that there will be no conflict of ideas between the two Bureaus interested.

In this last connection, we have always had it in mind that there could be no conflict of interest between the Reclamation project and the Indian Reservation as to the irrigation of these 2,400 acres of delta lands, because these lands are the last on the river and we have thought that return flow from irrigation below the headgate of the single canal that serves all of the Reclamation Project lands would be ample to irrigate these Indian lands so that never would the Reclamation Project have to refrain from diverting water in order to satisfy the Indians' earlier priority.

Very truly yours,

/s/ John F. Truesdell

Special Assistant to the
Attorney General.

CC Mr. Reed
CC Mr. Deitz
CC Mr. Weymouth

EXHIBIT NO. U-95

Reno, Nevada.
November 30, 1921.

Mr. John F. Richardson,
Project Manager,
Fallon, Nevada.

My dear Mr. Richardson:—

Our Reservation Indians ateNixon are in rather a serious condition without meat, owing to the shortage of water in the Truckee River, and the low water in the lake. The fish are not able to come over the bar at the river mouth, on account of this. There appears to be quite a swell in the river and if it is possible for you to spare about 200 second feet of water and allow the same to flow through the Derby Dam, for a few days, say a week, there will be undoubtedly sufficient fish come up into the lower Truckee and enable the Indians to catch enough for family use, by using their customary methods of fishing for the same with trolling spoon hooks.

If the water is shut off at this time to its present flow below the Derby Dam, it will be sufficient to allow the fish to move from pool to pool after they get out of the lake proper.

I am marking this personal, as I realize that I would have no right to ask it officially.

Hoping for an early reply, I am

Very sincerely yours,

Special Supervisor.

LDC:GM

PLAINTIFF'S EXHIBIT U-100

Admitted Nov. 24, 1975

NEVADA FISH AND GAME COMMISSION
Reno, Nevada

Jan. 14. 22.

Mr. L. D. Creel,
Acting Agent Pyramid Reservation,
Reno Gazette Bldg.,
Reno, Nevada.

Dear Mr. Creel:—

In reference to conversation between yourself and this commission on January 6th of this year, relative to rights of indians and whites fishing on Pyramid Lake, and why the nonsale of trout was passed. Will state this commission it has no jurisdiction over the indians while on the reservation, but do contend it has a right to prohibit whites from fishing on any of the waters of the State as provided in the State Laws.

The Fish and Game Commission during the past 10 years have caused to be planted in the Truckee River some 5,000,000 black spotted Trout as per enclosed record of plantings, these are all available to Pyramid Lake, as this specie of trout are adapted to lakes it is their nature so soon as they are large enough they begin dropping down stream and continue until the lake is reached where they remain until such time as they again ascend the river for the purpose of spawning.

The fish of Pyramid Lake have been decreasing for years owing to the fact that fish have been slaughtered by the thousands at the different dams by both whites and indians while the fish were fighting their way to the spawning beds. There are also hundreds of pelicans preying on the fish in the Pyramid Lake district, these birds are protected by the Federal Law, and a refuge is estab-

lished on an island in Pyramid Lake, while the conservists report pelicans not to eat trout but to live or prey on the unfood fish, but from personal observation I have the first pelican to see that ever turned a trout loose. I personally believe the pelican should be exterminated or nearly so.

There was a condition existing for several years that could only be remied by passing the non sale law, this was not intended in any way at the indian but only at Mr. Crosby of Wadsworth who ran a fish wagon and insisted on shipping all the fish he could gather up, there seemed to be no way to get at him. The ladder at the indian dam was kept blocked, the fish would congregate at this point and were hooked out by the hundreds, the indians using grab hooks. While the Superintendent Mr. Olliver would give the officials assurance the practice would be stopped but this was never done as the inducement was too great. While this cannot be proven it is the general opinion the superintendent was getting a cut from Mr. Crosby.

Now in all fairness to both fish and indians this commission wishes to stand for what is just and fair to all. If it can be so arranged that all the fish caught by the indians (with hook and line, and not grab hook) could be handled through the agency and cut out the middleman, each fish to bear a government stamp that same was from the agency, and that no fish would be taken from the river during their spawning season, also that the fish must have a clear passage over all dams that the fish may reach their spawning beds up stream that the number may increase this commission will accede to the sale of BLACK SPOTTED TROUT in order to help the indians and will so use its influence at the next legislature but in no way shall any middleman receive any part of the revenue from these sales.

There is one other evil greater than any previously mentioned and that of WATER if the government will

insist on transferring all the waters from the Truckee River through the Derby Canal to the Carson River, Pyramid Lake will soon be a thing of the past. It seems as there should be a certain amount of the water belonging to Pyramid Agency.

Very truly yours.

Nevada Fish and Game
Commission

/s/ J. E. Johnson

Sec.

P.S. The Black Spotted Trout above referred to are the Pyramid Lake Trout.

PLAINTIFF'S EXHIBIT U-101

Admitted Nov. 24, 1975

RENO INDIAN AGENCY,
Reno, Nevada,
January 18, 1922

(ADVANCE REPORT)

My dear Mr. Commissioner:

In advance of my regular report, and in the absence of Supervisor Wilson, I deem it highly important to write you in order that you may act promptly. You may take such action as you deem necessary in the premises.

At the outset, I beg to inform you that the fish problem is the most serious one we have to meet. I have realized this since my connection with the reservation in 1910, but so managed it as to avoid any criticism from State authorities or friction with its employees.

However, I am sorry to say that a different course seems to have been pursued by my successor, with disastrous results.

I found that the State Fish Commission and Superintendent Oliver had been in open conflict for several years past, as will be evidenced by the enclosed copy of letter received by me today from the Secretary of the Nevada Fish Commission, which will be used as an exhibit in my regular report on the fish situation, but is enclosed in this communication largely for the purpose of showing that the State Fish Commission is thoroughly alarmed over the water situation in the Truckee River.

I wish to state that I found the State Fish Commission very hostile; but by exhibiting a spirit of fairness in my investigation of this matter, the attitude of the Commission has been completely reversed and it is now anxious to cooperate with us in the highest degree.

After this matter was referred to me by Supervisor Wilson, (basing my action upon knowledge already in my possession and my experience in the past), after due reflection I felt that the time had arrived for a thorough study of the fish situation and everything connected therewith to be summed up in a thorough and careful manner and submitted to you through Mr. Wilson, in order that you might have on your desk a thorough study of the situation.

From the first I have felt that the most important matter connected with this fish problem has been completely overlooked by all parties having anything to do therewith; and the object of this letter is to bring this to your immediate attention, as follows:

The habits of the Black Spotted, or Pyramid Lake trout, are as follows: They are very similar to the salmon. While their home is in the lake, yet in order to reproduce themselves they must get into pure fresh water to spawn. By reason of the bar at the mouth of the Truckee River, a few second feet of water spreads over such a vast amount of territory that the fish are unable to get up into the fresh water; and they must have sufficient flow of water to get over the bar.

The trout appear at the mouth of the river about the middle of October, and if there is sufficient water flowing over the bar, they enter the stream and begin to advance slowly upstream from pool to pool, finally reaching their spawning beds, if possible, along in March. Unlike the salmon, if they are not too much injured in the process of reproduction, those that are alive return to the lake, their natural home. The young fish, after hatching, spend the summer in the river and return to the lake late in the fall, thus keeping up the cycle of existence.

The plans of the Reclamation Service apparently are based upon the use of every drop of water in the Truckee River for irrigation purposes. If this assumption is sustained, this means the total extermination of the Pyramid Lake trout within a very short period of time.

I have accumulated a great deal of material for this report, and in studying over the situation it is clear that the intent of the government, when the Pyramid Lake reservation was established, was to include Pyramid Lake for the use and benefit of the Paiute Indians. The only benefit to be derived therefrom apparently is the Pyramid Lake trout.

Now, if this view be the correct one, have not the Indians a prior right to sufficient water from the Truckee River to enable those trout to reach their natural spawning beds, in order that they may reproduce themselves? This question is so vital that I wish to recommend that it be taken up at once; and probably Mr. Truesdale and Mr. Withers, who are defending the right of the Indians to water for irrigation purposes, may so amend their brief on behalf of the Indians that this additional water right may be claimed for them, and thus save a separate action, with more prompt results.

For your information I would state that this water is necessary largely at times when it is not needed for irrigation purposes, viz., October, November, December, January, February and March, but the flow of the river is now diverted from its natural bed and carried over to the Lahontan Basin, where it is not stored but passes through a government owned power plant at about 150 second feet, which would be amply sufficient to enable the fish to ascend the river.

This power plant could be just as well located somewhere around the town of Derby and at the same time get as much fall as where it is now located.

Mr. Withers informs me that in the brief which he has prepared for defending the water rights of the Pyramid Lake band of Indians, he has made no contention for water to pass into the lake for the purpose of maintaining its level and preserving the fish.

I made a special trip to see Mr. Richardson, the Project Manager of the Newlands Irrigation Project at Fallon, and laid the case before him. He informed me that the plans of the project were not based upon allowing any of the water to go into Pyramid Lake for the purpose of preservation of the fish.

I also understand from him that it is planned to begin the storage of water in the Spanish Springs Reservoir at a very early date, which will take care of all the surplus water in prospect in the Truckee River, except an unusual flow. Provided this is done, it will be but a short time when the Pyramid Lake trout will cease to exist.

I hope to have my full report on this situation ready to submit to Supervisor Wilson upon his return, which is expected within a few days.

Trusting this will meet with your approval, I am,

Very sincerely yours,

Special Supervisor
(Acting through Supervisor
H. G. Wilson)

LBC-AHS

Hon. C. E. Burke,
Commissioner of Indian Affairs,
Washington, D.C.

Enclosures:

Letter of Dec. 5, 1921, from John F. Richardson to L. D. Creel

Letter of Dec. 13, 1921, from Nev. Fish & Game Com. to L. D. Creel

Letter of Jan. 11, 1922, to J. F. Richardson from L. D. Creel

Letter of Jan. 14, 1922, from Nev. Fish & Game Com. to L. D. Creel

PLAINTIFF'S EXHIBIT U-105

(COPY)

Admitted Nov. 24, 1975

RENO INDIAN AGENCY
Reno, Nevada,
January 28, 1922

Mr. H. G. Wilson,
Supervisor in Charge, Reno Agency,
Reno, Nevada.

My dear Mr. Wilson:

In reply to your letter of November 29, 1921, requesting that I carefully consider Office letters dated October 10th and November 15th and write a report for you on the same, I have the honor to submit the following:

While the information requested in these letters might have been covered in a few pages, yet, realizing that this was only a small part of the controversy, and fearing the Department had only fragmentary knowledge of the entire situation, I felt it my duty to go into the subject with extraordinary care, beginning with the dawn of history of the Pyramid Lake Reservation and tracing it down to the present day, collecting all the information possible concerning the subject; thus arranging it in such a way that it would be readily available to the office for reference and consideration when needed, as the whole question will not be settled until the water rights are determined and perfect accord and coordination established between the State and government authorities, also the Indian Department and the Reclamation service, as will appear in this report as it progresses.

While I have devoted an unusual amount of time to this work, I feel that the importance of the subject justifies this expenditure of time and labor. At least I hope that you and the office will consider it in this light.

• • • •

The story of the Pyramid Lake (black spotted) trout and its relation to the Paiute Indian and his reservation from 1859 down to the present time, with a brief look into its future:

Salmo Henshawii, or black spotted trout, commonly known as Pyramid Lake trout, is doubtless in reality a land locked salmon, possessing many characteristics of the salmon, but of very superior flesh and flavor; a noble specimen of fish. Besides affording considerable sport for the angler in its capture it is a marvelous food fish and has played a very important part in the early settlement of this State, furnishing the Paiute Indians a substantial food supply from time immemorial; and since the advent of the whites not only supplying their home tables but also a very liberal cash income, although the buyers and traders have always secured the lion's share of the profit.

This fish was formerly quite plentiful in Walker and Winnemucca Lakes, until the rapacity and greed of the white fishermen and the absorption of water for irrigation purposes practically extinguished the species in these two lakes; but a few specimens are now captured.

Pyramid Lake being much larger in area and of greater depth than these lakes, and having the advantage of a much larger water shed which furnished a copious run-off and supplied the stream and kept the lake at practically the same level, enabled the fish to reach their spawning beds, and through natural reproduction kept their numbers fairly well at an average in spite of the heavy inroads made upon them by both whites and Indians. This condition prevailed until about four years ago.

It is worthy to remark just here that there are now very few small fish caught within the last four years, which would indicate that the supply in the lake is being depleted much faster than the combined natural and artificial reproduction is able to repair the inroads of

man and its natural enemies, viz., pelicans and other fish-eating birds, reptiles and predatory fish.

The boundaries of the reservation, if no other evidence could be adduced, indicates that they were established to surround and segregate the lake from the public domain proper, which in 1859 was unsurveyed territory. We contend that the reservation dates from the year 1859 by reason of a letter dated that year written by the General Land Office to the Surveyor General of Utah, instructing him to recognize the points and boundaries indicated in his letter when the public domain should be surveyed. According to what the old Indians have told me, the lake was undoubtedly set aside for the use and benefit of the Indians on account of the bountiful supply of fish it contained, which was then and for many years thereafter thought to be inexhaustible; and not from any sentimental or other reasons.

Capt. Dave Numena, Chief of the Paiute tribe when I was in charge of the reservation and one of the wisest and most far seeing Indians I ever knew, had the fear ever present with him that some day in some way the whites would deprive his people of the lake; and in his frequent talks to me he always wound up with the statement, "This lake is my meat", and explaining further that "other Indian tribes were given cattle for food by the government, but the government gave us this lake from which we may secure our food for ourselves and families." He was then about eighty years of age and had seen many wonderful changes in conditions brought about by the inventions and activities of the whites, many of which were injurious and destructive to his people. Evidently, to paraphrase Scott:

> "The sunset of life gave him mystical lore,
> And coming events cast their shadows before."

This will be made clearer later on in this report.

At the time this reservation was set aside (1859) this country was a desert and literally a howling wilderness. The Paiutes were naked, nomadic savages, with no knowledge of agriculture, subsisting entirely upon pine nuts, seeds from the weeds and the grass, desert animal life, game and fish. Capt. Dave even told me of the large number of Indians who traveled long distances from the interior on foot to reach this lake in early spring for the purpose of catching fish to enable them to exist until their food became more plentiful. Many would die on the trail, and those who survived would reach the lake weak and greatly emaciated; but a few weeks of fish diet would make them well and strong, and later they would return to their regular range or camping places carrying great loads of dried fish on their backs in their burden baskets. The fish were so abundant that they were easily caught by means of crude tackle by the men, while the women cleaned the fish and dried them in the sun.

The officials who located the reservation undoubtedly saw such a scene and realized how necessary the fish were to the support of these people; and they knowing the greed of the white men, took this, the only course, to protect the Indians' main source of livelihood by including within the boundaries of the reservation the lake and several miles of river.

The irrigation of any of the land included within the boundaries of the reservation probably was given only minor consideration, if at all. While it was being practiced by the Mormons in the eastern part of this territory, Utah and Nevada all being under one territorial government, it was but a petty infant.

Neither the reservation officials nor the Indian Department had any vision of almost the whole volume of the Truckee River being diverted from its natural channel and carried in a vast canal away over into the valley of another stream and there spread out over thousands of acres of desert lands cultivated by white farmers.

Millions have been spent on this irrigation project, the success of which is even now trembling in the balance; but whether it proves a success or a failure, one thing is sure, Pyramid Lake with its marvelous scenery and changing colors is doomed. All the fish that now sport in its sparkling waters will cease to exist, and the end is not far distant.

As this is no fancy sketch or pessimistic dream, prompted by a vague fear without foundation other than that of which dreams are made, I beg leave to submit the following figures and deductions drawn therefrom.

The total area of Pyramid Lake is 216.64 square miles. This area reduced to acres, in round numbers, is 138,500.

The area of Winnemucca Lake, which lies nearly alongside and in the same basin, is 86.9 square miles, or 55,600 acres, making a total acreage of 194,000 acres.

The average evaporation is 4½ feet vertically over the entire surface annually. Within the last two years Winnemucca Lake has shrunk at least ten feet perpendicularly, and there are hundreds of acres of dry land which were fairly covered with water and afforded good fishing.

Pyramid Lake in the same time has lost at least as much, or according to the above rate of evaporation, 9 feet perpendicularly off its entire surface of 138,500 acres. These are the actual facts.

Again, before the inception of the Newlands project, Pyramid and Winnemucca Lakes represented practically the total run-off of the overflow from Lake Tahoe and the entire Truckee River water shed. These lakes having no outlet, all the run-off remained within their borders, except the 4½ feet lost then, as now, through evaporation.

While in dry seasons and light snow fall the level of these lakes shrunk quite severely, yet on the average it kept about normal. Now, if such was the case, then with the whole volume of the Truckee River pouring its flow

into their bosoms, how can these lakes maintain normal conditions and level with nearly all of these waters being diverted into another valley and no return flow possible? It is a physical impossibility.

From the letter of Mr. Shebley (the veteran fish culturist on the California State Commission), marked Exhibit "R", we learn that the great bar just at the mouth of the Truckee River on the southeast end of the lake was formed by the vast amount of sawdust, slabs and other refuse thrown into the stream from the various sawmills which line its banks in the mountain region, and this refuse almost wiped out the trout by destroying their natural spawning grounds. The State of California fought the mill men for over twelve years through the Courts, but finally conquered, which gave the trout another chance to recuperate and reestablish themselves. This was before any dams or artificial obstructions were built in the river to interrupt the passage of the fish to their spawning beds up the stream. True to their salmon-like nature, the natural home for this fish is in the lake; but in order to reproduce themselves they must reach pure fresh water in which to deposit their eggs. Unlike the salmon, many of them survive the efforts of reproduction and the effects of battling with the obstructions in the river; and those who do return as soon as possible after spawning to the confines of the lake. The young fry hatched from this spawn descends the stream late in the fall, if not interfered with by artificial obstructions, and follow their parents to the lake for a permanent home. They do not remain in the stream any longer than necessary to reproduce and grow large enough to return. This fact is understood only by those who have made a careful study of the matter. The impulse for reproduction begins to manifest itself early in October, and they begin to make their way, guided by instinct, to the mouth of the Truckee River, the only fresh water stream which reaches the lake. By the first of December there are large numbers of the

fish waiting at the mouth of the river to ascend. Before the natural flow of the river was interfered with, as fast as they reached the mouth they began to ascend slowly from pool to pool, making their way slowly up the stream as the spawn began to ripen and develop, until they would finally reach their spawning beds in February or March. The males always precede the females and prepare their spawning beds in advance of their arrival. Their advance up the stream now meets with a serious setback. This bar is so level, and the sand so shifting that the small amount of water reaching the lake is insufficient to allow them to pass over this bar and into the stream, unless quite a large volume of water is released for this purpose by the Irrigation Service. This year is the first time this has been done, and was done upon the special request of the Project Manager of the reclamation project. The fish had been waiting at this bar for practically two months, unable to pass it. When about 300 second feet of water had been turned down for six hours daily for a few days, I made a careful inspection of the stream from the lake shore up to the dam and discovered quite large numbers of fish proceeding up the stream, some of which were passing through the fishway at our irrigation dam, and the Indians were catching an abundance for food supply for their families. No sale outside of the reservation being allowed, the bulk of the fish undoubtedly passed up through our fish ladder to the stream above, particularly as I have given special and earnest orders that no fishing should be done within 600 feet of the dam, which request I am sure was faithfully obeyed.

The history of the reservation since its segregation has been not only enlivened by frequent attempts of the whites to manipulate and take possession of the fisheries and exploit them for their personal benefit, but apparently has been a thorn in the flesh for stockmen, prospectors, fishermen and adventurists down to the present date.

After the reservation was set aside in 1859, doubtless on account of the excitement and destruction incident to the civil war and its effects, there appears to have been no very close oversight of the reservation nor attention paid to the Indians as to their care or protection. History appears to be silent on this subject, except that about 1861 the Indians, being goaded to desperation by the numerous outrages perpetrated upon them by lawless whites, finally assembled in force at the reservation. Rumors reached Virginia City that the Paiutes meditated wiping out all of the white people in this section of the country. A number of miners and others at Virginia City, under the leadership of Major Ormsby, made a descent upon the reservation with the intention of wiping out the Indians. On the contrary,—although the Indians were but indifferently armed, a fierce battle ensued in which the whites were completely routed, leaving their leader dead upon the field with over forty of his men. The bodies were not recovered or buried for at least two months after the engagement.

* * * *

SUMMARY AND RECOMMENDATIONS

The reason for the length of this report and its wide scope is to supply the Indian office with all the information possible in order that it may have at hand in a compact form for reference a fund of information bearing on almost all phases of the subject of fish and fisheries, which has been brought to the attention of the office and often been dismissed with a brief letter in reply to its request for a *full report.*

In anticipation of the need for full information for future use in cases which are liable to arise at any time on account of the unsettled status of the water rights involving the flow of the Truckee River and other matters relating thereto, it has been thought best to treat the subject so fully.

The subject of allowing white residents of the State or tourists access to the lake either by fish permit or without, or the amount to be charged (if any charge at all is made), while a very important matter, is thought to be of minor value when considered in connection with the fact that the Indians have had no sale outside of the reservation for the surplus fish caught, by reason of the prohibitions in the State law, and which cannot be so amended as to meet their specific case until the Legislature assembles in January, 1923.

It has been thought best to bend every effort to the work of winning the support and sympathy of the State Fish Commission, the Washoe Fish and Game Association, and other influential sources for cooperation in the cause of the Indians, and thus secure in advance their influence to favor the amending of the present law so as to allow the sale of *Indian caught* Pyramid Lake trout in the open market in open season anywhere in the State. These promises have already been made to me by the bodies above referred to.

The more important matters of keeping up the fast dwindling supply in the lake through assisting the breeding fish to reach their spawning grounds for natural propagation; also to assist and encourage the State, through its Fish Commission, to continue in its highly important work of artificial propagation of the Pyramid Lake trout, is thought to take precedence over all other phases of the question.

While I may have gone beyond my instructions into outside fields, the further I investigated this matter the more important it appeared; and the results are herein respectfully presented for your consideration.

In another place I have submitted my plan and recommendation as to permits, etc.

I recommend that prompt action be taken to maintain a water right sufficient to enable the fish to propagate.

If the demands of agriculture and power are considered paramount to the value of the lake to the Indians, I respectfully recommend that the Interior Department take steps to award the Paiutes enrolled on Pyramid Lake Reservation a just and sufficient sum to be placed on interest and the same to be paid annually to reimburse them, as far as possible, for the loss of this source of income and support.

A list of exhibits and briefing of the same, including photographs, are also submitted herewith.

Respectfully submitted,

/s/ Lorenzo D. Creel,
Special Supervisor.

LDC-AHS

EXHIBIT NO. U-106

Ed-L & O
67539-21
77697-21
J R V
86375-21
L H D

RENO INDIAN AGENCY,
Reno, Nevada
February 2, 1922

The Commissioner
of Indian Affairs.

Sir:

* * * *

Mr. Creel submitted an "Advance Report" to your office under date of January 19, 1922, which should be considered with this report. He has also submitted to me his final report dated January 28, 1922. I am enclosing herewith both of Mr. Creel's reports and enclosures for the information of your Office.

It appears that for several years past the State Fish Commission of Nevada and a former Superintendent of the Pyramid Lake Reservation have disagreed concerning fishing regulations on Pyramid Lake. The Indians have been in the habit of catching fish for years past and selling to traders and others; and had in this way received an income of between four and five thousand dollars annually. I am informed that former Superintendent Oliver allowed a man named Crosby of Wadsworth, Nevada, to buy practically all of the fish caught by the Indians. Crosby paid the Indians from 6 to 12 cents per pound, and in return retailed the fish to white people from 20 to 50 cents per pound.

The State Fish and Game Commission, together with the Washoe Fish and Game Protective Association, were

of the opinion that this man Crosby was being favored, and retaliated by having the State Legislature of Nevada enact a law, (Assembly Bill 61. Chap. 236), denying Indians as well as others the right to sell fish. This law has worked a great hardship upon the Indians.

It is true that Pyramid Lake lies within the boundaries of the reservation and the Indians can sell fish at the lake, but they cannot take the fish to the nearby towns and sell them.

Supervisor Creel has held interviews with members of the State Fish Commission and of the Washoe Fish and Game Protective Association, and a mutual understanding has been arrived at and an agreement made to make an effort to have the next legislature, which meets in January, 1923, repeal this law so far as the Indians are concerned.

I have had an interview with the Secretary of the State Fish Commission, also with the President of the Washoe Fish and Game Protective Association, and both appear to be very willing to cooperate with the government in arriving at a satisfactory agreement concerning fishing and fishing regulations on Pyramid Lake.

The Pyramid Lake trout's habits are very similar to salmon, or steelhead, in that the fish live in the lake, but must go up the streams for spawning. In fact, these fish are nothing more than land-locked salmon, and are very similar to fish that I saw last June in the Quinsult River and Lake in the State of Washington.

Since there have been several dams built along the Truckee River for irrigation and power purposes, it is now quite difficult for the fish to ascend the stream to spawn. It is true that fish ladders have been constructed at those dams, but the ladders are not properly constructed, and the fish do not go up the ladders. One reason for this is that practically all of the water of the

Truckee River is diverted for a power plant, and an arrangement should be made with the Reclamation Service to allow more water to pass over the Derby Dam during the spawning season, which is from October to March, in order that the fish may be able to ascend to the upper Truckee River and to Lake Tahoe and its tributaries. The water is not needed for irrigation during this season, and is only diverted for purposes of the power plant.

I have discussed this matter with several persons who are familiar with the location of this dam and also the power plant; and they are of the opinion that it would be better to have this power plant located below the Derby Dam, as they claim practically all of the the water that is diverted and carried to the Carson River is wasted after it passes through the power plant; and that this water could as well be turned down the Truckee River into Pyramid Lake, if the power plant was located in the proper place.

I would recommend that the Indian Office take this matter up with the Reclamation Office in Washington, D.C., and see if some arrangement cannot be made whereby more water may be allowed to flow down the Truckee River and into Pyramid Lake.

It appears to me that as this reservation and lake were set aside for the use of these Indians about the year 1859, the Indians must certainly have a good water right, and should be allowed the use of more water, both for irrigation purposes and in order that the fish may be able to ascend the River during the spawning season.

Special Supervisor Creel recommends that the public be allowed to fish in Pyramid Lake without a permit or any restriction. I can hardly agree with the Special Supervisor in this recommendation; but believe all white persons who desire to fish in Pyramid Lake should be required to have permits issued under instructions from the officer in charge of the Pyramid Lake Reservation,

and that a nominal sum should be charged for these permits.

* * * *

Very respectfully,

/s/ [Illegible]

Supervisor in Charge

HGW-AHS

EXHIBIT NO. U-113

5-1100
Refer in Reply to the Following:
36212-22

Address Only the
Commissioner of Indian Affairs

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
Washington

May 5, 1922

Mr. James E. Jenkins,
Supt., Reno Agency.

Dear Mr. Jenkins:

This will refer to your predecessor's letter of February 2nd, transmitting with his recommendations, the report of Special Supervisor Creel relative to the fishing industry at Pyramid Lake. In Mr. Creel's preliminary report he suggests that possibly the Indians may have a prior right to sufficient water to enable the fish to ascend the river to their spawning beds. This phase of the matter will be investigated with the view of taking such action, if any, as the law and facts may justify.

Mr. Creel further suggests that the Lahontan power plant be moved from its present location to below the Derby dam so that after passing through the plant the water may be discharged into Truckee River to enable the fish to ascend the river with greater facility; also that the Reclamation Service be asked to allow more water to pass over the Derby dam during the spawning season (from October to March), within which period it is not required for irrigation purposes. These two matters will be taken up with the Reclamation Service with the view of ascertaining what, if anything, they can do in the premises.

In his main report, Mr. Creel recommends that, until the state legislature amends the present prohibitory law so as to permit the Indians to market fish anywhere in the State if properly identified, the general public be admitted to the lake without any permit or restrictions whatever except that they will not be allowed to operate boats on the lake, this privilege being reserved for the Indians. Mr. Wilson does not concur in this and says that be believes the permit system should be adopted and that the Secretary of the State Fish Commission and the President of the Washoe Fish and Game Protective Association agree with him in this. Should you concur, it is believed that the permit system should be adopted somewhat along the lines suggested in Mr. Wilson's letter. You may therefore submit a tentative draft of formal regulations pursuant thereto after conferring with the above officials and other interested parties who Mr. Wilson says wish to cooperate with this Service in the matter. The appointment of a patrol officer will be given consideration in connection with the regulations upon receipt thereof from you. What salary will it be necessary to pay?

Mr. Wilson says that several dams, equipped with fish ladders have been built along the Truckee River, but that the ladders were not properly constructed, by reason of which the fish do no use them. To what other dams does he refer, if any, besides the Derby dam of the Reclamation Service and our own diversion dam at Pyramid Lake? If you will report specifically on this point, particularly with respect to the adequacy of the ladder at the Derby dam, this phase of the matter will be taken up with the Reclamation Service, and also the question of screening the irrigation canals. So far as concerns the Indian Service dam at Pyramid Lake, if you will obtain from the State Fish Commission plans and specifications of adequate fish-ways for this dam, with an estimate of the cost thereof, this feature of the

case will be given consideration in the light of available funds.

The Office appreciates Mr. Creel's thorough and comprehensive report on this matter and is, of course, disposed to do everything it can to protect the fish, not only for the benefit of the Indians, but of the white population as well, so far as consistent with the larger interests involved in the proposition having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole.

It is suggested that you ask the Manager of the Newlands Project to go over the entire situation with you and Mr. Creel on the ground. It might also be well to have representatives of the State Fish Commission and the Nevada State Fish and Game Protective League, of Reno, accompany the party. The corresponding secretary of this league is Mr. C. P. Russell. The Reclamation Service here will give their Project Manager the necessary instructions.

Please give this matter your prompt attention, acknowledge receipt hereof, and report further in the premises at the earliest practicable date.

Sincerely yours,

/s/ E. B. Merritt

Acting Commissioner.

EXHIBIT NO. U-114

Ed-Ind.
67539-22
T B B

May 6, 1922

My dear Mr. Davis:

This Office has under consideration the report of one of its field officials relative to the fishing industry at Pyramid Lake, Nevada. It seems that, owing to the construction of the Derby Dam by the Reclamation Service, there is insufficient water in the Truckee River to enable the fish to get up-stream to their spawning beds. The season for this is from October to March, when the water is not required for irrigation purposes. In this connection, the report states:

> "For your information I would state that this water is necessary largely at times when it is not needed for irrigation purposes, viz., October, November, December, January, February and March, but the flow of the river is now diverted from its natural bed and carried over to the Lahontan Basin, where it is not stored but passes through a government owned power plant at about 150 second feet, which would be amply sufficient to enable the fish to ascend the river."

To partially remedy the situation, the report recommends that a greater quantity of water be allowed to flow over the dam during the period mentioned. It is also suggested, in the report, that the power plant might just as well be located below the Derby Dam. On this point, the report says:

> "I have discussed this matter with several persons who are familiar with the location of this dam and also the power plant; and they are of the opinion that it would be better to have this power plant

located below the Derby Dam, as they claim practically all of the water that is diverted and carried to the Carson River is wasted after it passes through the power plant; and that this water could as well be turned down the Truckee River into Pyramid Lake, if the power plant was located in the proper place."

It further appears that the irrigation canals leading from the Truckee River are not screened which permits the fish to get into the canals and die there; also, that should the plans of the Reclamation Service be fully carried out with respect to the extension of the Newlands Project, it will mean the practical extinction of the fish owing to lack of water in the Truckee River.

The fishing industry at Pyramid Lake is important, not only to the Indians as a means of livelihood, but also to the white population for recreational and sport purposes. This Office, therefore, desires to do everything practicable to conserve and protect the fish and to this end earnestly solicits your cooperation so far as may be consistent with the activities of the Reclamation Service.

The Superintendent in charge of the Pyramid Lake Reservation, Mr. James E. Jenkins, at Reno, has been instructed to go over the situation on the ground with the manager of the Newlands Project (to whom it is understood you will issue the necessary instructions), with the view of reaching an agreement in respect to the above matters, which will, of course, be subject to the approval of this Office and yourself.

Your cooperation in this matter will be greatly appreciated.

Sincerely yours,

/s/ E.B. Meritt
Acting Commissioner.

5-HES-5.

Hon. A. P. Davis,
Director, United States Reclamation Service.

PLAINTIFF'S EXHIBIT U-123

Admitted Nov. 24, 1975

DEPARTMENT OF JUSTICE
Washington, D.C.

R-182979

Denver, Colorado,
230 Post Office Building,
August 15, 1922.

Ans Aug 22/22

The Attorney General,
Washington, D.C.

Sir:

Your wire of the 12th addressed to me at Fallon, Nevada, reached me at Denver at noon of the 14th. I am directed to investigate the matter of a temporary water master to protect the Government's water rights in the Truckee River for the Pyramid Lake Indians in Nevada pending the final determination of the Orr water case, and and to take such action as the circumstances might justify. I am familiar with the situation—it being the same as last year when I was on the ground. I immediately wired to the Project Manager, Newlands Project, to find out how much water was in the river at Derby dam where the Government Reclamation canal diverts water from the Truckee river for the use of the Newlands project. I also went to the Reclamation headquarters in Denver to obtain what further information could be had. I then wired the Department to the effect that the Reclamation Service should be ordered to so regulate its diversions as not to interfere with the prior rights of the Indians and the prior rights of the twelve small white ditches diverting water below the Derby dam.

The Project Manager wired me in response to my inquiries that there were 210 second feet of water in the

river at Derby dam and that the Reclamation Service was diverting 190 feet for its uses upon about 5000 acres of project lands. I had a long conference with the Reclamation men at Denver again this morning. I also wired the Project Manager and the Superintendent of the Indian Reservation for further facts. I think that by tomorrow I shall be fully informed as to all essential facts. I find the situation as follows:

The Indians have the first right to the water in the Truckee river. They need water now for about 1500 acres of land.

Twelve small ditches below the Derby dam belonging to white people, irrigating 1489 acres of land, have the second right.

The Newlands project has the third and last right to divert at the Derby dam what water is not needed for the 1500 acres of Indian lands and the 1489 acres of white lands.

For several years past, notably in 1921, the Reclamation Service has been taking so much water out of the river at the Derby dam that the Indians have had difficulty in irrigating their crops. The Indians are the lowest down the river, so that they have suffered most. The water left in the river by the Reclamation Service for the use of the Indians and whites, whose rights are prior to the Reclamation Project, has been practically all diverted by the whites, so that the Indians at times got only the return flow and waste. This sometimes has been insufficient.

If we knew how much water the whites are entitled to use, then a water master could regulate their diversion, so that if the Reclamation Service left enough water in the river to supply the prior rights of the Indians and the prior rights of the twelve white ditches, then the Indians would not be short. But the rights of the whites have not

yet been determined—that is what the Orr case is about. It will be argued on September 11th. We know that every one of the white ditches has a priority ahead of the Newlands Project, but we do not know how much water they will be entitled to divert. They have for years been divertmore than we think they need.

An examination of the river flows for many years past discloses the fact that there has always been more than enough natural flow water in the river at Derby dam to supply the needs of the Indians and these twelve small white ditches, and the twelve white ditches below the dam were unable to divert enough water to affect the Indian rights. But the situation was changed after the Reclamation Service began its large diversion at Derby dam to supply a water priority subsequent and inferior to both the Indians and the twelve white ditches. It seems that the Reclamation Service does not always let enough water pass the Derby dam to supply what the white canal owners think they need and what they have been diverting for years before the Reclamation Act was passed. These twelve white ditches will insist upon diverting what they have been diverting for years past until their rights have been determined and limited and physically controlled by the Court in the final determination of the pending suit. Our proof as to the amount of water needed by these 12 small white ditches is expert evidence based on theory and demonstration by Osgood, Harding and Taylor. The matter is to be argued as a whole beginning September 11th. It is impracticable and inadvisable, in my opinion, to attempt to try this case piece-meal, especially as the threatened shortage for the Indian lands can be easily remedied by the Reclamation Service not taking so much water to supply its late and inferior priority. These twelve white ditches are small and in a canon so that any excessive diversion will quickly get back into the river. The Indians can be easily supplied by the use of a little care and foresight on the part of the Rec-

lamation Service, and a comparatively small addition to the flow now allowed to pass Derby dam.

In effect this controversy is one between the Indian Service and the Reclamation Service—both under the control of the Secretary of the Interior.

The water rights of all users from the Truckee river will be determined before July, 1923, and the river will be under the control of a water master appointed by the United States Court. The present trouble will last at the most only a few weeks, and that will be the last of it. This matter it seems to me ought to be settled by the Interior Department as between its two bureaus.

Should I go to the Court the Judge unquestionably will order the Reclamation Service to let enough water pass the Derby dam to supply the white ditches with what they have been in the habit of using for years back, even though it is much more than we think they should use. I am sure it is inadvisable to go to court at this time—less than a month before the hearing on September 11th, on a matter the Reclamation Service can easily remedy.

I shall in the morning have some further details of water flows at the Indian ditch and the releases from Lake Tahoe. I know the essential facts, so that there seems to me to be no use just now of my going to Nevada. I am certain we should not go to the Court, and I am equally as certain that this matter can be and should be adjusted in Washington between the Reclamation Service and the Indian Service of the Interior Department. I shall hold myself ready to go to Nevada at any time if the Department thinks I should ask the Court for any relief.

Very respectfully,

/s/ Ethelbert Ward
Special Assistant to the
Attorney General.

EXHIBIT NO. A-40196-B

Admitted Nov. 18, 1975

(COPY)

KPO:OGD

Fallon, Nevada. October 14, 1922.

Project Manager

Director

Fishing Industry, Pyramid Reservation, Nevada.

1. Reference is made to my letter of August 31, 1922 as to submitting report on above subject.

2. This matter came up on the advance report of Capt. Lorenzo D. Creel of January 19, 1922 and his principal report of January 28, 1922 to the Indian Service. The latter report and file of appurtenant letters were kindly made available to this office by Mr. J. E. Jenkins, Superintendent of the Reno Indian Agency.

3. Cap't Creel's report was found to be, as reputed, a careful review of the industry, and to include much valuable historical data and information regarding the Pyramid Lake trout. Further information was obtained from Mr. Joe Johnson, Secretary of the Nevada Fish Commission and Mr. H. H. Kennedy, Vice Pres. of the Reno National Bank, sportsmen of the highest type in the state.

4. A review of the data shows that the fishing industry has been and can be of great importance commercially to the Indians. Just at present a Nevada State Law prohibits peddling of fish outside the reservation but it is authoritatively stated that a report of the sportsmen on this matter will be out in December and that there is little doubt that the State and the Indian Service will get together on matters and pass a new law through the legislature this coming January that will be mutually satisfactory.

5. Certain records of fish catches or sales are available as follows:

1871	Not less than 20,000 lbs. (at 10 or 12¢ a pound) caught by Indians	$2,000 to $2,500
1879	70,741 lbs. poached by whites Sold for	$7,310.14
1884	70,000 lbs. shipped, About 6¢ to Indians	4,200.00
1917 to 1920—	60,000 lbs. or so shipped out by Indians each year	
Apr. 16 to Feb. 15, 1921—	60,000 lbs. shipped out by Indians	

This tends to show a revenue possible of about $5,000 to $10,000 per year to the Indians besides their own fish supply, fresh and dried. This very probably can be improved by fostering of the industry with proper care and protection for propagation of the fish.

6. There is no desire to lessen the importance of the Indians' fishing business but it would be well to show the comparative possibilities along the agricultural line. There are figured to be 3130 acres of bottom land available for development. At the present time about 400 acres of the now irrigated lands can be devoted to cultivated crops. Potatoes fluctuate quite widely in price but will average about $20.00 per ton to the grower. A fair yield on these bottom alluvial soils would be 6 tons per acre of a value of $120 per acre or $48,000 per year, for 400 acres of potatoes. There are 3100 acres available for cultivation. This merely serves to show the eventual importance of the agricultural development. It should not be inferred that intensive cultivation only is suggested; any permanently successful development is quite sure to be based on the stock industry.

7. The fishing industry has been shown to have been of great value to the Indians as a sure source of food in

a desert country, particularly during the early stages of their Reservation life when irrigation efforts were often set at naught on account of an uncontrolled river and undependable diversion dams. Irrigation has not yet assumed the importance that it should and doubtless eventually will. Nevertheless, the fishing industry will rank of great value and peculiar benefit to the Indians. It seems to be desirable to do all possible to restore the industry and maintain it. The assertion is made by Mr. Johnson, heretofore mentioned, that there is not one trout now in Pyramid Lake where at one time there was a thousand, and that of them but few are small ones, which goes to show that spawning and replenishment has been interfered with.

8. The fishing industry is based on the "black spotted" trout. Salmo purpuratus Henshavi, Leord, as brought out by Capt. Creel and confirmed by Russell on p. 62 of his excellent monograph on "Geological History of Lake Lahontan." The latter mentions five other fish inhabiting the lake but these are of decidedly minor importance other than the "queovio", a form of sucker that the Indians also catch in great number at the concrete dam, and dry for winter food.

9. It seems proven necessary that the "black spotted" trout shall spawn in fresh running water. When of about 2½ pounds weight the females reach the spawning size. The authorities roughly agree that about November 1st to December 1st the fish are on their way to the spawning grounds, the best places being probably from Verdi to Tahoe. The spawning proceeds to probably in April and May. When possible the fish, after spawning, return to the lake and the young fry follows in the fall and do not leave again till ready to spawn.

10. The difficulties in the situation seem to be as follows:

(a) Captain Creel has drawn the attention of his Bureau to the depletion of Pyramid and Winne-

mucca Lakes by evaporation and lack of sufficient inflow on account of diversion of stream flow for irrigated lands, particularly of the Newlands Project. The effects of diversion are not yet very important but with further reclamation of land will become more pronounced.

(b) Irregularities in the flow of the Truckee River have resulted in the flow now going to Pyramid and now to Winnemucca or often to both lakes. Storm and wave action has often thrown a bar across the mouth of the Truckee in the delta area of Pyramid Lake thereby not only forcing all the water to Winnemucca Lake but also sealing the trout in Pyramid Lake until such time as some flood flow would again break through the bar and open the river to the fish. Or again the wave action may so spread the sediment across the inlet as to give a depth of but 3 or 4 inches which is inadequate to float the spawning size of fish across into the river.

(c) It is said the Indian dam fish ladder broke up badly last winter, has a bad swirl at its foot that makes it difficult for the fish to enter, and is quite open to poachers, matters all requiring attention if a good run of fish is to go up the river.

(d) Lack of flow in the river at "running" time also often prevents the migration.

(e) Lack of a fish screen on the Government's Main Truckee Canal is alleged to be a source of large loss in fry or fish in the river. It might be noted that the loss would not be final as such fish would go to Lahontan Reservoir if not lost in lateral canals. Loss in the laterals might warrant suitable action.

(f) Pelicans are alleged to be a large source of loss. It is proposed by Mr. Johnson that the pelicans

should be driven out by breaking up their nests. Action along this line would have to be taken up with the Federal Government as Anaho Island is now a Federal bird reservation.

(g) The sawdust of the mills of former years, together with the sand, at the mouth of the Truckee into Pyramid Lake is claimed to be the principal source of trouble from bars as heretofore mentioned. This old wood waste is still represented by some pulp waste, particularly from the wood grinding operations at the Floriston mill. In an excellent paper by George C. Whipple, M. Am. Soc. C. E., in the August 1922 Proceedings of the Society this matter was fully discussed. The great losses sustained in extravagant use of natural resources, extinction of fish, increased costs of water supply purification, etc., by these paper mill operations, is all carefully gone into. Trout and salmon in particular (and our "black spotted" trout is a form of the latter, it will be recalled) are shown to be especially subject to being killed off or driven away by these pulp wastes, as they of all fish demand the purest waters. Whipple has shown how the slimes collect in the channel and on the rocks below these pulp mills and that certain fungi flourish in these waters and then kill the fish by collecting in their gills and depriving them of the possibility of getting the oxygen from the water, the said dissolved oxygen in the water being also exhausted or depleted by these mill operations even where efforts are made to abate the troubles by corrective measures. The brown water and suspended filamentous material that can still be seen in the Truckee from the Floriston mill and the Reno sewage is one of the difficulties yet to be met. Whipple mentions that the very same fungi resulting from pulp pollution also occur with sewage.

11. It is seen that many factors enter into the matter of thePyramid Lake fishing industry. We can say of the matter just what Mr. Whipple said of pulp mill pollution in general at the very close of his above mentioned article:—

> "Although there has been a recent laxity in law enforcement, it is hoped that the next move will not be toward a too arbitrary enforcement of ill-considered laws, but that means will be found to accomplish by co-operative effort what is so difficult to accomplish by law. It would appear that the Society is one of the organizations which should take the lead in this important matter of conservation."

12. As regards depletion of Pyramid and Winnemucca Lakes, a graph is herewith submitted showing the delta areas at the north end of the lakes and the fluctuations of their levels from known elevations and inflow data. The high elevations of 1890 and 1891 taken from the U.S.G.S. Quadrangle maps do not appear to conform to datum of other levels as the period in which they occur was one of inflow below normal. The great flood and enormous runoff of 1862, of probably over 25,000 second feet and of around 3,000,000 acre feet, must have found the lakes much lower than the predicted elevations shown for 1865. It appears that Pyramid Lake is now about 16 feet lower than in 1865 but Winnemucca is still 30 feet higher than at that time.

13. From the 40th Parallel Surveys of 1867 and the U.S.G.S. Quandrangle maps it is shown that the areas of the lakes are as follows:—

Pyramid	140,000 acres	
Winnemucca	60,000 acres	
Tahoe	120,000 acres	(for comparison)

The recession of the lakes is not yet startling. They were probably as low or lower just prior to the sixties. As noted, Winnemucca Lake has been 30 ft. lower. Pyramid was probably within a few feet of what it is now when

Lieut. J. C. Fremont discovered it in January 1844 on one of his trips of exploration. On January 13, 1844 he camped in the Indian village at the inlet to the lake (about 3 miles below present Agency). He says in his diary that the lake was about 12 feet below the spring stage, assuming that the difference was all accounted for thereby. If the Indians were then at inlet it is doubtful if high water could have been more than 3870 or 3875 and level of 12 ft. lower than would have been about 3858 or 3863. It is now elevation 3860. One fair flood year of 1,500,000 acre feet runoff could put 11 feet into Pyramid Lake. Three wet years could restore both lakes. We appear to be now about due for a cycle of wet years.

14. It should be recognized that the lakes are doomed to extinction or a measure of extinction. Russell in his monograph (pp. 2, 250) has pointed out that these lakes among others have probably been completely desiccated prior to present stage.

15. The effect of present proposed plans of the Reclamation Service can be studied on the basis of Mr. Henny's report of September 1918, table VII, on the basis of Winnemucca Lake being entirely cut off and all flow going to Pyramid.

Loss to Pyramid Lake.
(Based on 4 ft. evaporation per year)

	Ac. Ft.
1. 151,000 acres Carson lands	
68% or 102,500 acres served by Truckee	
32% or 48,500 " " " Carson	
68% of 564,500 ac. ft. total supply	384,100
2. All supply to 15,000 acres Truckee Bench	79,400
" " " 7,000 " Lahontan "	35,000
" " " 19,000 " Pyramid lands	42,500
Total annual loss to Pyramid	541,000
Saved by cutting off Winnemucca Lake	240,000
Net loss to Pyramid	301,000

Resulting shrinkage of Pyramid 75,000 acres or area cut in half.

According to Russell's map, p. 56, this would shrink the lake about 200 ft. in depth leaving it about 150 ft. deep.

Loss to Pyramid Lake
(Based on 83,000 acres Carson land area)

		Ac. Ft.
1.	83,000 acres Carson area	
	48,500 " served by Carson	
	34,500 " " " Truckee	129,000
2.	All supply to 15,000 acres Truckee bench	79,400
3.	" " " 7,000 " Lahontan "	35,000
4.	" " " 19,000 " Pyramid lands	42,500
	Total annual loss to Pyramid	285,900
	Saved by cutting off Winnemucca Lake	240,000
	Net loss to Pyramid	45,900
	Resulting shrinkage of Pyramid, 11,500 acres or about only 8%	

16. My suggestion is that Winnemucca Lake be permanently cut off from the river. If continuing extension of the irrigated area was made, of course ultimately Pyramid Lake would be also dried up but pending any further plans the cutting off of Winnemucca Lake will permit of a balance being established in Pyramid that will maintain the fishing industry for many years to come.

17. If it is decided to permanently cut off Winnemucca Lake from Truckee River it will offer the best opportunity in the West to study the actual evaporation loss from a large water area. There will be almost no inflow and a minimum of rainfall and I would recommend that a careful study of the lake under these conditions be authorized for the valuable data that would be thereby obtained.

18. Training jetties into Pyramid would doubtless be required in addition to cutting off of Winnemucca Lake in order to keep the bar properly open for fish through the flat delta area.

19. Provision for adequate flows for the fish preceding spawning time must be considered. Contemplated further storage on the Truckee should provide for and solve this question. It might be taken up with the In-

dian Service, which doubtless would cooperate to some extent in the construction costs in order to maintain proper spawning, on which any maintenance and development of the fishing industry must depend.

20. Cooperative study and action should be sought on the other questions. One of the gravest and most difficult is the continuing sliming and fouling of the river by the pulp mill wastes and by the Reno sewage which breed the deadly fungi growths heretofore mentioned. It appears to be a matter for joint study by the Bureau of Fisheries and the Fish Commissions of Nevada and California and the sportsmen's associations of this state.

21. I would suggest that the plan of cutting off Winnemucca Lake permanently might be put up to the Indian Service. Their interest may be sufficient to induce them to do this work. Possibly the Service might prepare or cooperate on surveys and plans.

22. My final conclusion is that the Pyramid Fishing Industry may be permanently protected or maintained for many years to come (depending on ultimate irrigation development) by the following principal changes:—

a. Cutting off Winnemucca Lake.

b. Elimination of pulp mill waste.

c. Purification of Reno and Sparks sewage.

JOHN F. RICHARDSON.

cc—C. D.

EXHIBIT NO. U-152

Ed-Ind
93022-23
E J A

Dec. 17, 1923

My dear Mr. Richards:

Your letter of December 4, disscussing certain matters affecting the welfare of Indians in the State of Nevada, has been received.

Regarding the matter of fish protection, it may be stated that arrangements are now being made to have an engineer of this Service make a detailed investigation and report of conditions along the entire Truckee River and at Pyramid Lake, as to just what is necessary and the estimated cost thereof in order to accomplish the desired result, particularly as concerns the dredging of the river channel. The fish ladder at Pyramid Lake has partially been rebuilt in conformity with plans prepared by one of our engineers and approved by local interested parties with a view of affording the fish proper facilities for going upstream to spawn. It was assumed that the situation, concerning which complaints were made in the past, was remedied.

We fully realize the value and importance of the fish, not only to the Indians but also to the people of that section of the country generally and will do everything that is possible for the preservation of this industry so far as is in our jurisdiction and within the limitation imposed by available funds.

The condition of the colony of Indians living in the vicinity of Elko has been the subject of considerable correspondence and Superintendent Jenkins has been authorized to expend the sum of $2,000 in the construction and repair of homes for these Indians and in the purchase of necessary clothing and food supplies to carry them through the winter without suffering. Funds at our disposal for purposes such as these are very limited and the Indians must be taught to provide for themselves

as far as possible just as if they were whites. The cooperation of local white people in getting the Indians to take advantage of all opportunities offered them to secure employment and in the bettering of their style of living is necessary if anything of lasting benefit is to be accomplished.

Regarding the matter of failure on the part of the government to contribute necessary school fees for Indian children in some of the rural schools, while no specific instances are given it is presumed that you have reference to the fact that during the fiscal year 1923 funds appropriated for public school tuition had become exhausted prior to the receipt and approval of some of the contracts with public school districts and therefore the Office could neither approve such contracts or authorize payment of the tuition. However, the appropriation has since been somewhat replenished and measures are now being taken to pay tuition in Nevada and in other States to the extent that funds are applicable. The appropriation for the fiscal year 1924 allows $250,000 instead of $200,000 as appropriated for 1923 and it is believed that there will be sufficient money for payment of all tuition under contract for the Indian children in Nevada during the current fiscal year.

It is noted that you will consider in detail at some later date the matter of the conflict between State laws of Nevada and the rights of Reservation Indians as to fishing privileges. You may be assured of the hearty cooperation of this Bureau in anything which will tend to promote the welfare of the Nevada Indians.

Cordially yours,

/s/ Chas. H. Burke
Commissioner.

Hon. Chas. L. Richards,
House of Representatives.

12 FJL 13
Carbon to Reno

EXHIBIT U-160

Admitted Nov 24 1975

Received May 2 1924

MEETING HELD IN RENO, NEVADA,
ON APRIL 9, 1924.

FOR THE PURPOSE OF DISCUSSING PLANS
FOR THE CONSERVATION OF FISH LIFE
IN THE TRUCKEE RIVER.

Present:

Mr. John F. Richardson, Project Manager of the Newland Project, representing the Secretary of the Interior.

Mr. C. A. Engle of Blackfoot, Idaho, Supervising Engineer of the Bureau of Indian Affairs.

Mr. J. E. Jenkins, in charge of Indian Affairs in Nevada.

Mayor E. E. Roberts of Reno, Nevada.

Dr. M. A. Robinson, of Reno, Nevada.

Mr. Joe Johnson, State Fish and Game Commissioner of Nevada.

Mr. James Vogt, Superintendent of the State Hatchery.

Mr. George I. James, County Game Warden. As well as other County and City Officials.

The meeting was called to order by Mayor E. E. Roberts, and turned over to Dr. M. A. Robinson, who was chosen as chairman.

Mr. John F. Richardson, the first speaker of the evening stated that he was present for the purpose of finding out what steps could be taken to conserve the fish life in the Truckee River, and would recommend any reasonable plan that might be adopted.

Mr. C. A. Engle then gave an outline of his survey of the Truckee River, which was made at the request of the Commissioner of Indian Affairs. This recommends; First: that all dams be provided with proper fish ladders; Second: that the stream flow be increased by economy in irrigation; Third: that a possible reduction in the number of pelicans be made; Fourth: that all irrigation canals be provided with screens; Fifth: that the pollution of the stream be reduced; Sixth: that the over-flow into Winnemucca Lake be cut off as much as possible; Seventh: that any legal water-rights in that section be purchased; Eighth: that a channel be constructed across the sand bar at the mouth of the river.

Mr. Engle expects to make a further survey this summer, in which he will take into consideration the changes that irrigation will cause by diverting the water and depleting the stream flow, which causes a double disadvantage to fish life.

In taking up the question of fish ladders Mr. Vogt discussed the river, starting at Pyramid Lake. He stated that there was not water enough at the mouth of the river to allow big fish to pass the sand bar, necessitating the construction of a channel. The ladder at the Indian Dam works good at times depending on the amount of water. The ladder at Derby Dam is not in working order, as the construction of this ladder was never completed. All the remaining ladders are either improperly constructed or not kept in working order. Considering the flow of the river he states, that after July 1st practically all the water is taken up by power plants or used for irrigation, resulting in a scarcety of food for fish. Pollution also causes greater damage during low water, and results from investigations show the condition of the water to be such that fish spawn cannot propagate.

The problem of screening all ditches was next discussed. A resolution was passed asking the Fish and Game Com-

mission to apply to the Governor of this State for funds to investigate and select a proper screen for all ditches.

Mr. Richardson then suggested the investigation of the pelicans, and find out facts regarding their destructiveness toward the fish life, whereupon a resolution was passed to recommend the reduction of the pelicans, if found necessary.

A resolution was passed and a committee of three, Mr. Vogt, Mr. Jenkins and Mr. A. E. Doaney, appointed to meet with Mr. Richardson, to select and design a ladder for the Derby Dam.

Next a resolution was passed adopting Mr. Engles' recommendations as a whole.

The pollution of the Truckee River was then discussed, not only in regard to fish life, but also in regard to the Fernley and Fallon water users.

Mr. Richardson then suggested that the Secretary of the Interior might confere with authorities of California, and Nevada, and invite them to a thorough investigation, and survey of the Truckee River, and also cooperate in accordance with the survey of Mr. Engles.

This concluded the program and the meeting was adjourned.

EXHIBIT NO. A-356

Admitted Nov. 18, 1975

DEPARTMENT OF JUSTICE
Washington, D.C.

230 Postoffice Building,
Denver, Colorado, August 14, 1924.

U.S. v. Orr Water Ditch Co., et al.
Truckee River Water Adjudication Suit,
U.S. District Court, Nevada.

The Attorney General,
Washington, D.C.

Sir:

I enclose excerpts from the Master's proposed findings in the above suit which were announced July 26, 1924. I also enclose a copy of this proposed decree. Exceptions to the findings and proposed decree are to be filed with the Master by September 1, 1924, and arguments will be heard thereon within a few days thereafter. The time for hearing, however, has not been yet announced.

The proposed findings are in longhand on 125 bound sheets of blue print 25 inches long by 16 inches wide and weigh 8 or 10 lbs. The greater part of the same is taken up in schedules giving the description of lands irrigated by quarter sections and the duty of water for each farm. This, however, applies only to lands not within the Newlands Project. Accompanying this list is a memorandum as to the differences between the Master's proposed allowance and the amounts testified to by the Government's experts. It will be seen that the Master has increased the amount testified to by our experts, but not to any alarming extent. The general average of in-

crease, so far as the lands outside of the Project are concerned, is about 22%.

The decree seems to me very satisfactory in that it has sustained the Government on all legal points contested. I call attention to the following:

1. The Indians of the Pyramid Lake Reservation are given the first rights in the river with a priority dating from December 8, 1859, the date when the Commissioner of the General Land Office directed the Surveyor General of the then Territory of Utah to set aside the Pyramid Lake Indian Reservation. The President's Executive Order for the same was not issued until 1874. Strenuous efforts were made by opposing counsel to limit the Indian rights to the year 1874.

2. The Newlands Reclamation Project is given an absolute priority for 1500 second feet, of date July 2, 1902, the date of the withdrawal of the public lands by the Secretary of the Interior for the then Truckee Carson Project. This finding is based upon the fact that the unappropriated waters in the Truckee River on July 2, 1902, belonged to the United States and a withdrawal of the public lands and the initiation of its Reclamation Project by necessary implication withdrew the unappropriated water needed for the reclamation of the same. This amount was determined by the Government with due diligence constructing the Truckee Canal with a capacity for 1600 second feet. This point was strenuously fought during 9 days argument in September, 1922.

3. Rotation is enforced between ditches and water users. This will result in a great saving of water and an improvement both in irrigation practice and in the amount and quality of crops raised.

4. The seasonal use of water is limited to a specified amount in acre feet, which is less than half what is generally claimed by the owners of lands outside of the Project.

5. Different allowances of water are made for different crops.

The provisions as to Lake Tahoe storage, I think, were inserted by the Master to impress the water users around Reno that the Government had a right from time to time to run stored water from Tahoe past the Reno ditches without interference. No residents or land owners in California were made parties defendant to this suit, nocould they be so made under the law existing when the suit was brought and final arguments were made. I do not see how the United States District Court of Nevada in this suit can have any jurisdiction over property rights in California. I have decided not to suggest any changes in this, but I understand that objections will be made by some of the defendants.

I understand that a number of the lawyers and politicians of Nevada are trying to organize the owners of land outside of Project to make a determined fight directed principally against the amount of water allowed. If the farmers will contribute liberally to lawyers' fees and court expenses, they probably will advise fighting the case as long as the money is forthcoming.

It will be necessary for me to be present at Reno when the exceptions are argued before the Master.

The only exception I so far think advisable for the Government to make is that in reference to the further compensation of the Master. I shall except to the same being paid wholly by the United States and suggest that payment be made by the parties in proportion to their property interests involved.

I have discussed this decree with Mr. John F. Richardson, Superintendent of the Newlands Project, and he says that he has no exceptions to suggest. I have also discussed less in detail with the officials of the Reclamation Bureau at Denver, and one of the force now, Mr. Patrick,

who is familiar with the Newlands project, is carefully examining the proposed findings and decree with a view to informing me if there are further exceptions to be filed with the Master.

After the exceptions are argued before the Master, his proposed findings and decree, as modified, will be filed with the Clerk of the United States District Court, and, under the equity rules, 20 days will be allowed for filing exceptions in that Court.

I shall do my utmost to push this matter to an early conclusion.

Very respectfully,

/s/ Ethelbert Ward
Special Assistant to the
Attorney General.

EW/ELM

EXHIBIT NO. B-484

Admitted Nov. 18, 1975

IN THE DISTRICT COURT
OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA

In Equity, Docket No. A-3

UNITED STATES OF AMERICA,
Complainant,

—vs—

ORR WATER DITCH COMPANY, *et al.*,
Defendants.

OBJECTIONS AND EXCEPTIONS TO PROPOSED FINDINGS AND PROPOSED DECREE OF SPECIAL MASTER.

COME NOW the defendants in the above entitled matter [listing of Defendants and attorneys through page 8, line 13, is omitted].

• • • •

As to claim No. 1 as the same is designated in said proposed decree, these defendants object to the date of priority as found by the Special Master applicable to the Indian Ditch and to the application of the doctrine of relation as set forth in said proposed decree as being applicable to the lands comprising the Pyramid Lake Indian Reservation; and, in this respect, defendants respectfully show that by the very calculations and tabulations of acreage as set forth in said decree and in the proof offered in support of said proposed decree an acreage is found and

established by the Special Master in excess of that now under cultivation; and, in this respect, defendants object to all of the proposed findings contained on Page 2 of the Special Master's report, wherein it is found and proposed to be decided that the lands comprising the Pyramid Lake Indian Reservation withdrawn from entry March 23, 1872, "thereby and by implication and by relation as of date December 8, 1859," are entitled to a priority of rights to the waters of the Truckee River and its tributaries for 3,110 acres with a priority of December 8, 1859, and an additional allowance of five acres for each Indian allotment, with a priority of December 8, 1859, without regard to diversion, appropriation or beneficial use by the plaintiff or the Indian allottees as of date of such priority or of subsequent date and until the present time; that such finding is not supported by the evidence; that such finding is inconsistent with the rule of prior appropriation, which said rule is by the Special Master adhered to and applied to these, and each of these, several defendants.

And in this respect defendants further assert by way of objection that the date of priority given to the plaintiff, the United States of America, and its Indian lands and Indian allotments, as set forth on Page 2 of the proposed decree of the special master, to-wit, 1859, is erroneous, in that no withdrawal of said lands was made or entered until in the year 1874, on which said last named year said lands were withdrawn by Presidential proclamation; and defendants further object to the allowance of water as proposed to be made by said proposed decree of the Special Master to the lands of plaintiff withdrawn as Indian lands; and, in this respect, defendants respectfully assert that, as they are advised and read the proposed findings and decree, it appears that the Special Master has established to and for these defendants the policy of recognizing only their actual applications of water put to an actual beneficial use and for the actual requirements of the land, while as to the Indian allotments and lands under the In-

dian Ditch the Special Master has attempted to establish a different policy, thereby applying the doctrine of relations and thereby including water rights with a date of 1859, and applies an appropriation of water as of said last named date to lands and allotments upon which no water has been used up to the present time; and, in this respect, defendants assert that as to these allotments and lands priority of diversion and application to a beneficial use should govern.

II.

DEFENDANTS FURTHER EXCEPT AND OBJECT to the proposed findings and decree, for the reason that it appears that as to the lands of the plaintiff included within the so-called Truckee-Carson or Newlands Project the Special Master has applied the doctrine of relations as to lands not yet reclaimed, and as to which there appears no entryman or applicant, and as to which the probability of application of water to a beneficial use is so far remote as to destroy the real meaning and intendment of the doctrine of relations. On the other hand, as appears from the findings and decree, the right to bring in irrigable lands not heretofore reclaimed under ditches and ditch systems and ditch surveys made by these defendants has been denied, and as to these the decree and findings of the Special Master appear to have overlooked or rejected the application of the doctrine of relations.

III.

THE DEFENDANTS FURTHER EXCEPT AND OBJECT upon the ground that the proposed finding and decree bearing on and referring to the rights of the plaintiff to water from the Truckee River to be diverted through the Derby Canal by means of the Derby Dam makes an excessive allowance, wherein it establishes 232,800 acres of land as the basis for the application of the allowance of water so made; and, in this respect, the acreage 232,800 acres is far in excess of the proposed

project area in that the said area, whatever the same may be, is served in the greater part and to a large extent by means of the waters of the Carson River stored in the Lahonton Reservoir, and the amount of land that can be irrigated by an economical use of the stored waters of the Lahonton Reservoir has not been segregated to show the necessary draft for the remaininglands to be made upon the Truckee River supply; and, in this respect, defendants assert that with reference to the Government rights through the Truckee Canal, the same should be fixed at only such an amount of water as may be necessary to supply the deficiency not supplied for said project area from the Carson River; and, in this respect, defendants assert that, while the decree and findings of the Special Master appear to adopt a policy for the prevention of waste of water as regards its applications to the lands of the defendants, no consideration is given to the uneconomic and wasteful use of water on the lands of the plaintiff embraced within the now reclaimed lands of the Newlands or Truckee-Carson Project; and it further appears, and to which defendants except and object, that the proposed findings and decree make no attempt to establish a reasonable limit of time within which the United States Reclamation Service, the agent of the plaintiff, is required to make beneficial use of the water allotted thereto.

IV.

AND THE DEFENDANTS FURTHER EXCEPT AND OBJECT to the proposed findings and decree for the reason that said findings and decree do not attempt to apply the laws of appropriation as the same are referred to in the Act of June, 1902, known as the Reclamation Act, nor do they attempt to recognize the same as being applicable or binding upon the United States Reclamation Service, and said proposed findings and decree specifically omit any direction, adjudication or establishment of the time or times within which the United States Reclamation Service, the agent of plaintiff, is required to make beneficial use of the waters allotted by the decree.

* * * *

PYRAMID LAKE INDIAN RESERVATION PRIORITY

XI.

THE DEFENDANTS EXCEPT AND OBJECT to the retention in the proposed findings and decree of any allowance to the use of water for the benefit of the Indians upon the Pyramid Lake Indian Reservation upon a priority date of December 8, 1859; and, in this respect, defendants assert that under the terms and provisions of Sec. 3, Article 4 of the Constitution of the United States, the Acts of Congress enabling the people of the State of Nevada to form a constitution and state government and for the admission of such state into the Union on equal footing with the original states, and upon the compliance therewith by the people of the State of Nevada and by the State of Nevada the control and right to regulate the appropriation, use and distribution of all of the then unappropriazed waters of the State of Nevada for irrigation purposes, and that by reason thereof the State of Nevada has, ever since October 31, 1864, had, and now has, the exclusive right to control and regulate the appropriation, use and distribution of all waters within the state for irrigation purposes which had not been appropriated on said date.

That any withdrawal or contemplated withdrawal of waters in Nevada for irrigation purposes was by it cancelled and relinquished to the State of Nevada by the United States on December 8, 1864.

In fixing Indian priorities as of date December 8, 1859, the Special Master failed to take into consideration certain facts of which the court will take judicial notice. No treaty was made with the Indians at that time. The court will take judicial notice of the fact that the Indians actually engaged in war against the white settlers of the Territory of Nevada, which continued actively throughout the years 1860, 1861 and 1862, and thereafter continued intermittently for a number of years before a

status of peace existed between the Indians and the White inhabitants of the Territory.

For the foregoing reason, no priority should be granted to the Indians as earlier than the date of the confirmation order of the President, March 23, 1874.

That under the allegations of the amended bill of complaint in this action, and under all of the evidence in this case, the United States did not appropriate any water for the use and benefit of the Indians on the Pyramid Lake Indian Reservation until the year 1882, and then no more than sufficient water to irrigate not to exceed 1800 acres of bottom land within said reservation.

That the United States has, with uniform consistency, and particularly by the Act of Congress of July 26, 1866, entitled, "An Act granting the right of way to ditch and canal owners over public lands, and for other purposes," and again by the Act of Congress of March 8, 1891, providing for rights of way for ditches and canals, for the purpose of irrigation, through public lands and reservations of the United States, and again by the Act of Congress of June 17, 1902, commonly known as "The Reclamation Act," and again by the Act of Congress of June 20, 1920, known as "The Federal Water Power Act," and by those several Acts of Congress heretofore in these objections set forth, recognized the right of the State of Nevada to control and regulate the appropriation, use and distribution of all water within its domain for irrigation purposes since its admission as a state. In furtherance and in support of these expressions, defendants respectfully show the acquiescence of the plaintiff in this action in the laws and customs of the State of Nevada inasmuch as the so-called appropriation for the Newlands Reclamation Project, formerly called the Truckee-Carson Irrigation Project, was made in conformity with and in compliance with the then existing laws of the State of Nevada.

[Illegible] defendants further OBJECT AND EXCEPT to the findings [Illegible] of the Special Master as the

same makes any allowance for [Illegible] water for the irrigation of the Pyramid Lake Indian Reservation bench lands under Indian allotments with any earlier priority than that of April 21, 1904, for the reason that under the provisions of the laws of the State of Nevada an appropriation of water for the irrigation of said bench lands was not even contemplated until April 21, 1904, prior to which time the Session Act of 1903 of the Legislature of the State of Nevada was in full force and effect; and defendants respectfully draw the attention of the Special Master to the provisions of the Act of Congress of April 21, 1904, which defendants contend clearly indicate that Congress only intended the irrigation of said bench lands as part of the Reclamation Project organized under the Reclamation Act of June 17, 1902.

THE DEFENDANTS EXCEPT AND OBJECT to the retention in the proposed findings and decree of any allowance of the use of water for the use and benefit of the Indians upon the Pyramid Lake Indian Reservation upon a priority date of December 8, 1859, for the additional reasons, to-wit:

(a) That—conceding for the purpose of the objection without admitting it as a fact that the unappropriated land and water subsequent to the year 1848 belong to the United States Government—it would be an invasion and destructive of the vested property rights of the defendants and in contravention of the law and the case made to decree to the Pyramid Lake Indian Reservation water of or having a priority over that decreed to the lands of the defendants, in view of the facts established under the evidence in this case and the clear and unambiguous provisions in the Acts of Congress of the United States applicable thereto heretofore referred to, to-wit: "An Act granting the Right of Way to Ditch and Canal Owners over Public Lands, and for other purposes," of date July 26, 1866; an Act of July 9, 1870, being amendatory of the Act of July 26, 1866, Section 9 of the Act of July 26, 1866, reading:

> "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, *the possessors and owners of such vested rights* shall be maintained and protected in the same."

And by Section 17 of the Act of July 9, 1870, supra, it is *inter alia* provided:

> "x x x and all patents granted or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, *as may have been acquired* under or recognized by the Ninth Section of the Act of which this Act is amendatory."

That the Act of July 26, 1866, authorized, contemplated and provided for two classes of rights, viz., those *existing*, and those *to be acquired*, appears from the statute, and it has been so construed by the courts and is so recognized by Congress by Section 17 of the Act of July 9, 1870, supra, wherein it is stated:

> "Such water rights as may have been *acquired* under or *recognized* by the Ninth Section of the Act of which this is amendatory."

By an Act of Congress of March 8, 1891, providing for rights of way for ditches and canals for the purposes of irrigation through public lands and reservations of the United States; by an Act of Congress of June 17, 1902, commonly known as "The Reclamation Act," and by an Act of Congress of June 20, 1920, officially designated as "The Federal Water Power Act, water rights existing, to be acquired, acquired or recognized have been contemplated.

The Congress of the United States has gone farther than the mere enactment of legislation as hereinabove

mentioned. In 1876, the State of Colorado was admitted into the Union, and, prior to its admission, the articles of its organic law were passed upon and approved by Congress. The Constitution adopted by Colorado and approved by Congress sets forth as follows (Article 16, Section 5):

> "The waters of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public; and the same is dedicated to the use of the people of the State subject to appropriation as hereinafter provided."

(Section 6)

> "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation is given the better right as between those using the water for the same purpose;"

(Section 8)

> "The General Assembly shall provide by law that the Board of County Commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

In 1899, the State of Wyoming was admitted to the Union, and its Constitution and the provisions thereof were, prior to the admission of the State, approved by Congress. The Constitution of the State of Wyoming (Article 8, Section 1) provides:

> "The water of all natural streams, springs, lakes or other collection of still water within the boundaries of the State are hereby declared to be the property of the state."

* * * *

SUGGESTIONS

The defendants respectfully make the following suggestions for the consideration of the Master in the formation of a decree that will do equity, and respectfully request that these suggestions have the consideration of the Master without the intervention of any partisan agency, to-wit:

* * * *

IV.

THE ELIMINATION OF THE INDIAN LAND PRIORITY OF DATE 1859.

V.

THE ESTABLISHMENT OF INDIAN LAND PRIORITY IN CONFORMITY WITH ACTUAL APPLICATION OF WATER TO THE LAND.

VI.

THE ELIMINATION OF THE INDIAN BENCH LAND PRIORITY.

VII.

THE ESTABLISHMENT OF THE INDIAN BENCH LAND PRIORITY TO CONFORM TO THE RECLAMATION ACT.

* * * *

WHEREFORE, these defendants pray that the proposed findings and decree be modified and corrected in accordance with the exceptions and objections above specified.

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

Solicitors for Defendants.

EXHIBIT NO. A-99012

* * * *

THE WITHDRAWAL OF THE INDIAN RESERVATION BY THE COMMISSIONER OF THE GENERAL LAND OFFICE.

We will first examine further the principles enunciated in the authorities cited in our opening brief (pp. 3-5).

When an emergency arises which demands that portions of the public domain be set apart for a public purpose, neither Congress nor the President is in position to take immediate action. Nothing can be done by either one until a knowledge of the facts showing the necessity of the reservation has been obtained. This requires an investigation, and an investigation requires time; and while the investigation is being made, the Government's rights may be granted to private persons and lost to the people unless there is some means whereby they may be preserved in statu quo until proper action can be taken. This preservation of the status quo is accomplished by an immediate withdrawal made by the Secretary of the Interior or by the Commissioner of the General Land Office. Authority for this withdrawal is not given by statute, but results from the silent acquiescence of Congress with full knowledge of the practice. Such action on the part of the Secretary of the Interior and also of the Commissioner of the General Land Office is held to be a part of and one of the steps in the final reservation made by the President. If this temporary withdrawal were not given the full force and effect of the permanent reservation afterwards made by Congress or by the President, then the purpose to be accomplished has been defeated, and the attempt to preserve the status quo has failed, and the temporary withdrawal was fruitless and in vain.

This authority in the Commissioner of the General Land Office was recognized in Central Pacific Ry. Co., 45 L.D. 502, where his authority to set apart the Pyramid

Lake Indian Reservation was attacked; and was specifically upheld by the Supreme Court in the case of U.S. v. Midwest Oil Co., 236 U.S. 459. The Court said:

> But that the existence of this power was recognized and its exercise by the Executive assented to by Congress is emphasized by the fact that the abovementioned withdrawals were issued after the report which the Secretary of the Interior made in 1902, in response to a resolution of the Senate calling for information "as to what, if any," of the public lands, have been withdrawn from disposition under the settlement or other laws by order of the Commissioner of the General Land Office, and what, if any, authority of law exists for such order of withdrawal."
>
> The answer to this specific inquiry was returned March 3, 1902 (Senate Doc. 232, 57th Cong. 1st Sess. vol. 17). On that date the Secretary transmitted to the Senate the elaborate and detailed report of the Commissioner of the Land Office, who, in response to the inquiry as to the authority by which withdrawals had been made, answered that:
>
> "The power of the Executive Department of the government to make reservations of land for public use, and to temporarily withdraw lands from appropriation by individuals as exigencies might demand, to prevent fraud, to aid in proper administration, and in aid of pending legislation, is one that has been long recognized both in the acts of Congress and the decisions of the court; . . . . that this power has been long exercised by the Commissioner of the General Land Office is shown by reference to the date of some of the withdrawals enumerated . . . . The attached list embraces only such lands as were withdrawn by this office, acting on its own motion, in cases where the emergencies appeared to demand such action in furtherance of public interest, and

does not include lands withdrawn under express statutes so directed."

U.S. v. Midwest Oil Co., 236 U.S. 459, 480.

And again on page 481:

This report refers to withdrawals, and not to reservations. It is most important in connection with the present inquiry as to whether Congress knew of the practice to make temporary withdrawals and knowingly assented thereto. It will be noted that the resolution called on the Department to state the extent of such withdrawals and the authority by which they were made. The officer of the land department, in his answer, shows that there have been a large number of withdrawals made for good, but for non-statutory reasons. He shows that these 92 orders had been made by virtue of a long-continued practice and under claim of a right to take such action in the public interest "as exigencies might demand. . ." Congress, with notice of this practice and of this claim of authority, received the report. Neither at that Session, nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

U.S. v. Midwest Oil Co., 236 U.S. 459, 481.

And on page 471:

But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For, prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the

> property of the people. The President was in a position to know when the public interest required particular portion of the people's lands to be withdrawn from entry or location, his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least 252 Executive orders making reservations for useful, though nonstatutory, purposes.
>
> U.S. v. Midwest Oil Co., 236, U.S. 459, 471.

And again on Page 479:

> But in the majority of cases there was no subsequent legislation in reference to such lands, although the withdrawal orders prevented the acquisition of any private interest in such land until after the order was revoked.
>
> U.S. v. Midwest Oil Co., 236 U.S. 459, 479.

Now we will consider counsel's objections. He asserts on page 12 of his brief that the proof on which the government relies of the original reservation of the Indian lands is a letter from the Commissioner of Indian Affairs to the Commissioner of the General Land Office of date November 29, 1859; and he says "The letter relied upon by plaintiff as proof of its claim that the reservation was set aside on November 29th, 1859, reads as follows:" and he quotes the above letter in full. He is altogether mistaken. That letter was not even introduced as a part of the plaintiff's case in chief. It is merely explanatory of the circumstances calling for the instructions contained in the letter upon which the plaintiff does rely. (See Plaintiff's Opening Brief, pp. 3 and 4). The letter upon which plaintiff relies is a letter of date December 8, 1859, from the Commissioner of the General Land Office instructing the Surveyor General of Utah, which

then included Nevada, to reserve these lands for Indian purposes (Plaintiff's Exhibit No. 6, Indian Records). It is as follows:

General Land Office,
December 8, 1859.

Samuel C. Stambaugh,
Surveyor General,
Salt Lake City, Utah.

Sir:

Pursuant to request, per letter of the 29th ulto., from the Commissioner of Indian Affairs, you are hereby instructed to reserve for Indian purposes the two tracts of lands described and indicated by the pink shade on the enclosed map of Utah.

1st "A tract of the North Western portion of the valley of the Truckee River, including "Pyramid Lake". This tract is triangular shaped and its greatest length about fifty three miles and its greatest width twenty five miles.

2nd "A tract in the North Eastern part of the valley of Walker's river including "Walker's Lake". This is an oblong tract—its greatest length about fifty five miles—its width at the south end fifteen miles—at its north end eight miles.

You will make such annotations upon the corrected Map of the Utah Surveying District as will show the reservations and in such a manner, that hereafter when surveying operations reach the localities, the township lines may be extended over the tracts and such connections therewith made as will show in the township plats and archives of the Surveyor General's office the extent and purpose, with the date of Reservation. You will please acknowledge the receipt of these instructions.

Respectfully,

S. A. Smith.
Commissioner.

This letter reads: "You are hereby instructed to reserve for Indian purposes," etc. It is a reservation for a specific purpose. Counsel attempts to draw a distinction between a "reservation" and a "withdrawal". But a power to make a permanent reservation includes the power to make a temporary withdrawal, U.S. v. Midwest Oil Co., 236 U.S. 459, 475-6; so that under the narrowest construction this letter includes a temporary withdrawal, which is one step in the permanent reservation afterwards made by the President by metes and bounds after the land had been surveyed.

Congress has recognized a national duty to the Indians. They were the sole possessors of the country before the Whites came. Their lands have been taken away from them. They have been forced to give up their habits of life, and their customs. An earnest effort is being made to overcome their nomadic and wild habits and to get them to settle down and become useful citizens. Perhaps the most important step in this direction has been to segregate from sale, and reserve for them, some habitable tract of land within the public domain heretofore claimed by them, and to allot to them severally farms sufficient to produce a living.

The defendants deny the sufficiency of the steps taken by the Land Department, on December 8, 1859, to withdraw the Pyramid Lake Indian Reservation, and contend that there was no reservation in existence prior to the order of President Grant of March 23, 1874. If there was no such reservation prior to March 23, 1874, no water rights could attach prior to that time, and since nearly all water rights of the defendants were asserted prior to that date, the Indians would get no water except such as has not been appropriated by the Whites.

In the arid Western states, land cannot be cultivated without water to irrigate it, and setting apart arid land for the Indians to live on without water to irrigate it, would be futile and senseless, and would in fact be holding

out the word of promise to these unfortunate people, and making this pretense a mere subterfuge for taking from them everything they have, and herding them upon a barren desert to languish and die. That our Government has been guilty of such a two-faced, dis-graceful act is a thought that is abhorrent to every decent American citizen. The Government has not done it. If any proof is necessary to show that it has not done it, this proof is furnished in the case of Winters v U.S. 207, U.S. 564. See, also, Skeem v U.S. 273 Fed. 93. But, say the defendants, the Government has done this very thing: first because the State owns the public unnavigable waters, and the Government has no control over them and has no power to reserve them, and it has never turned its hand to acquire any water rights for the Indians, and they have no such rights except such as they themselves may have acquired under the State Law by actual appropriation; second, because the nature of water is such that the first user has the better right. We have discussed these matters in our opening and reply briefs. Upon the correct determination depends the whole Indian policy of the United States.

In this connection we call attention to the language of the Court in United States v Conrad Investment Co., 156 Fed. 123:

> The avowed purpose of the government was to encourage the Indians in habits of industry, and to induce them to engage in pastoral pursuits and the cultivation of the soil, in order that they might not only become self-supporting, but that they should eventually take on the habits and busy themselves with the enterprises of the civilized races. And, further, through the long-established policy of the general government, it was designed that eventually those Indians would come into individual allotments of these reservation lands, and occupy and own them in severalty, and that when the allotments were made the Indians should utilize them in the more approved

manner of which they were susceptible. The lands being arid, the need of water is manifest, and so it must be considered that it was likewise designed that the Indians should have and enjoy the use of water in available streams wherever their needs might require. The Indian problem was and is, however, in a state of development. How well the government will eventually succeed in inducing these Indians to adopt the habits of a pastoral and agricultural people is not yet apparent. It has made progress with other tribes, and why may it not accomplish beneficial results in that line with these? ..... Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art. The government, however, being their guardian, has a most important trust to perform in this relation; that is, so to conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future needs, when they have ultimately secured their allotments in severalty. What these needs will be cannot be definitely determined. For the present, the matter is administrative in its detail. These Indians are now but the wards of the government. As it pertains to the lands which the government is holding in trust for them, it is administering them for their proper use and benefit, and in its administrative capacity it ought to be the judge of what amount of the waters of the streams adjacent to the reservation is or will eventually be essential for the needs of the Indians for use in connection with their lands.

United States v Conrad Investment Co. 156 Fed. 123, 129.

In 1901, before the first decision in the Winters case, Judge Hallett said:

> The government has had full authority to manage and control the Indians and to take all necessary steps for the welfare of those unfortunate people from the earliest times. Therefore the ditch and the diversion of water from the Rio Las Pinos was a public act done pursuant to law and for a public purpose.
>
> Such acts are not subject to interruption from any source whatever. No citizen can interfere to prevent or annul anything done by the government pursuant to law in the management and control of the Indians. The acts of congress and of the state Assembly relating to appropriation of water for irrigating lands were made for and are applicable only to cases arising between citizens. They have no application whatever to the case in which water is appropriated to a public use by the government in the exercise of its sovereign authority over the Indian tribes.
>
> United States v Morrison, 203 Fed. 364, 366.

On January 9 and 10 last (1922), the Government's right in non-navigable waters in the public lands states were discussed before the Supreme Court in the case of Wyoming v Colorado, and we herewith submit the Government's brief filed in that case by the Solicitor General and request that it be considered in this case.

Respectfully submitted,

R. G. WITHERS,
Solicitor for the Plaintiff.

Of Counsel:

J. F. TRUESDELL
ETHELBERT WARD
Special Assistants to the Attorney General.

PLAINTIFF'S EXHIBIT U-169

DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN FIELD SERVICE

Reno Agency,
Reno, Nevada,
January 20, 1925.

Commissioner of Indian Affairs,
Washington, D.C.

Sir:

Referring to my letter of 7th instant regarding the proposed enlargement of the canal at Derby to take out additional water for the Fallon project (in the event that the Spanish Springs appropriation becomes available; the attention of your Office is again called to the fact that something definite should be done about the protection of the water and water rights of the Pyramid Lake Indians.

This matter has been up for years, and your Office is filled with data on the subject; but each year the Indians lose more and more water. It would appear that their rights are not being properly protected. Further, it would seem that the taking out of water at Derby (25 miles below Reno on the Truckee river) and diverting this water—much of which belongs to the lands of Pyramid Lake reservation 25 miles below—to lands at Fallon—much of which goes to waste in the Carson "sink" is anything but a good business proposition; and this is the opinion of practically all the disinterested citizens of this State. However, be that as it may, some effort must be made to stop the further looting of this water. Already there are a number of attorneys investigating the extent of damage done to Pyramid Lake Indians and a damage suit against the Government will no doubt soon follow.

Today several Indians were in from Pyramid Lake to

talk about the water situation. I enclose copy of the minutes of the meeting, stating their views, which is for the information of your Office.

Respectfully submitted,

/s/ James E. Jenkins
Superintendent.

DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN FIELD SERVICE

Reno, Nevada, January 20, 1925

MINUTES OF MEETING WITH DELEGATION FROM PYRAMID LAKE

Abraham Mauwee, Joe Green, Joe Lowery, Fed Calico And others.

(Fred Calico, Interpreter)

Abraham Mauwee says: He heard letter about water situation (my letter to W. H. Simmons, Fallon). Says he wants the water turned down from Derby dam. Must have the water to save their fish; that is our water and should be turned down to us. We are under the Government and the Government should protect our rights to this water, and not allow the water taken away from us. If you (Supt.) will help strong we may be able to get this water. We are supposed to talk things over and keep them running in good shape. For that reason I came here. The lake is drying up and we must have the water that belongs to us. If the water reaches there soon we will be well satisfied, but cannot wait long. If the water is turned down the fish will come up—that will please all—both Indians and whites—as it would benefit all. Last year many thousands of fish died in lake and river for lack of water; you know this. When the fish died I said nothing, but it looked bad and I was sorry, for the Government has promised to furnish us with water and to protect us. Fishing is our principal industry and we can get 25¢ per pound for all our fish, which means many thousands of dollars for us as well as food for our families—all of which will be lost if the water that belongs to us is taken away.

Fred Calico says: ' are no fish running now, as in past years, and our people have no fish for sale—they

can not, therefore, get credit at the stores. We want the law changed for a longer season. We have ourselves observed four months as the closed season, viz: February 1st to June 1st, and think the open season on both river and lake on the reservation should be June 1st to February 1st a period of eight (8) months. (This all the Indians agreed to.)

All present called attention to dams (below Derby) on the reservation, which have been built by settlers; these dams are of sticks, manure, etc., and take out water that should be allowed to go down the river. We want you to see the U.S. Attorney and see if notice can not be served to make these people stop interfering with water that by right should go to the reservation.

Joe Lowery says: I was over near Fallon this summer and saw a big lake there; it was doing no good; it was water that was taken away from us and belongs in Pyramid Lake; we want this stopped. The Indians and whites at Fallon were getting water, but we Indians on Pyramid Lake reservation were not getting any. We want to ask if this is right?

PLAINTIFF'S EXHIBIT U-179

Reno, Nevada
Feb. 24, 1925

Mr. J. P. Richardson,
Sup't Reclamation
Fallon, Nevada.

Dear Mr. Richardson:

As the time is at hand for the Nevada Fish and Game Commission to establish an egg collecting station at the Indian Dam to collect Black Spotted Trout spawn.

The writer having made a personal Investigation of the river, finds the following condition existing. The water of the Truckee River being all diverted to the Government canal at the Derby Dam, with the exception of limited amount that is seeping through the gates. The fish ladder was entirely dry, not a particle of water in it. There was a small amount of water being [illegible] back into the river near Derby. I should say about ⅓ of the amount refered to permit the fish to ascend the stream.

Would it be possible for you to permit enough water to pass the Derby Dam to make it possible for the fish to pass up stream, this will require a flow of water for some four weeks.

Thanking you for your attention in this matter and an early reply, as the Fish and Game Commission wish to establish the egg collecting station at the Dam the latter part of this week. Will say that the Black Spotted Trout will be in the height of reproduction about the 1st of March until the 13th.

Very truly yours,
Nevada Fish & Game
Commission

/s/ J. E. Johnson

JEJ;

PLAINTIFF'S EXHIBIT U-181

STATE OF NEVADA
EXECUTIVE CHAMBER

Carson City

March 2, 1925

Mr. J. E. Jenkins,
Superintendent
U. S. Indian Service,
Gazette Building,
Reno, Nevada

Dear Mr. Jenkins:

I am advised that the authorities in charge of the Newlands Project are diverting practically all of the water now running in the Truckee River into the diversion canal and the consequent shortage of water in the river is causing the death of a large number of fish which at this season of the year are attempting to ascend the Truckee River from Pyramid Lake.

Practically all the ditches on the Truckee River are now shut off except for stock water in an attempt to conserve the supply.

I am writing to Mr. John F. Richardson, Manager of the Newlands Project on this subject and I am advising you of the facts for the reason that you are also interested in preserving the fish life in the Truckee River for the benefit of the Indians at the Pyramid Reservation.

Anything you can do to assist in this direction will be appreciated.

Yours truly,

/s/ J. G. Scrugham
Governor

HM:LB

PLAINTIFF'S EXHIBIT U-23

Admitted Nov. 24, 1975

I.K.W.

182979-271 March 30, 1925

U. S. v. Orr Water Ditch Co. et al.

Ethelbert Ward, Esq.,
Special Assistant to the Attorney General,
#230 Postoffice Building,
Denver, Colorado.

Sir:

The department has received an inquiry from a Member of Congress concerning the above case. He desires a copy of the last amended bill, and one or more samples of the answers filed and the replies of the government thereto. He seems particularly interested in that aspect of the suit connected with the Pyramid Lake Indian Reservation and the rights of the Indians, and also in the preservation of the Truckee River as a fishing stream. Apparently some action is contemplated looking to legislation requiring installation of means for facilitating the passing of fish over the dams, etc. He inquired especially whether the adjudication suit involved any questions, or has brought out any information, concerning the fishing rights of the Indians. I assume, of course, that nothing of the kind is involved, but would like a direct statement from you concerning it.

If you have in your office a copy of the last amended bill, and copies sufficient to form a sample of the pleadings filed by the defendants, and the government's replies, please send us copies thereof as soon as you can have them made. If they are not in Denver, please ask

the United States Attorney to send them direct to the department from Reno.

Respectfully,

For the Attorney General,

/s/ Ira K. Wells
Assistant Attorney General.

PLAINTIFF'S EXHIBIT U-24

Admitted Nov. 24, 1975

DEPARTMENT OF JUSTICE
Washington, D.C.

I.K.W.-W.W.D.

182979-271.

230 Postoffice Building,
Denver, Colorado, April 3, 1925.

U.S. v. Orr Water Ditch Co., et al.
Nevada.

(To Hon. John E. Raker, Apl 8/25)

The Attorney General,
Washington, D. C.

Sir:

Replying to your request of March 30th initialed as above:

I enclose two printed copies of the last amended bill of complaint. The answers, counterclaim, cross-complaints, etc. were sent from this office to Mr. R. G. Withers when he had charge of the case and they are now in the possession of Mr. E. P. Osgood, holding them for me. There is no copy of any answer or counterclaim of any defendant in this office. I do find, however, a few copies of replies made by the Government. I enclose one entitled "The Reply of the United States to the Counterclaim or Cross-complaint of defendants William Fugate, et al." This is a fairly good specimen copy of the numerous replies filed by the Government.

The United States Attorney and his predecessors in office have had nothing to do with this case. I have written Mr. Osgood to send two sample sets of answer and counterclaim of a defendant, and the reply of the United

States thereto. I have asked him to mark on these that they should be returned to me in order that my set of pleadings may be complete in case the case is appealed or other use is required of these pleadings.

You will see from the bill of complaint that nothing is said about fish or water to be used for fish passing up and down the stream. Nothing appeared about this subject in any pleadings, nor was any testimony taken or any suggestion made from the beginning of the case down to the present time regarding fish.

Inasmuch as the Government has control of the Derby Dam, I have always thought that the Reclamation Service and the Indian Service, both bureaus of the Department of the Interior, could settle the matter between them as to providing the proper fishways and the comparatively small amount of water which may be needed to enable the fish to pass up the fishways.

Very respectfully,

/s/ Ethelbert Ward
Special Assistant to the
Attorney General.

EW/ELM

EXHIBIT NO. A-99005

CERTIFIED COPY

ss: In Equity, No. A3

UNITED STATES OF AMERICA

*** DISTRICT OF NEVADA

I, John A. Porter, Clerk of the United States District Court for the *** District of Nevada, do hereby certify that the annexed and foregoing is a true and full copy of the original Special Master's General Explanatory Report in EQUITY NO A3

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Reno, this 13th day of November, A. D. 1975.

JOHN A. PORTER
Clerk

By: /s/ Ophelia Robey
Deputy Clerk

IN THE DISTRICT COURT
OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA

In Equity, No. A3
UNITED STATES OF AMERICA,
Plaintiff,

—vs—

ORR WATER DITCH COMPANY, *et al.*,
Defendants.

SPECIAL MASTER'S GENERAL EXPLANATORY REPORT

A report giving details regarding all of the 806 water rights which have been determined in this case would contain hundreds of pages which might never be needed by the court. Such a report is unnecessary because rehearings have been had regarding the most of the rights of the defendants which were not originally allowed to their satisfaction by the proposed findings, and revisions of these have been made since the rehearings, which in all respects except the general one relating to duty of water hereinafter considered, appear to be satisfactory to all the defendants except in the three or four instances in which it is expected that further dispute or content between defendants will be carried to the attention of the court. As to these, special reports may be supplied if ~~necessary~~ needed. Consequently, this report is made for the purpose of reviewing the general propositions involved, and being helpful to the court and counsel by explaining the reasons for the conclusions reached by the Special Master regarding these propositions.

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THE CASE.

The original complaint in this action was filed on March 3, 1913, the day before the first inauguration of President Wilson. By leave of court an amended complaint was filed July 25, 1914, which brought in additional defendants and new allegations. Later other parties intervened. This court has jurisdiction of the case because the United States is a party. The suit was brought by the direction and authority of the Attorney-General for the purpose of obtaining an adjudication of the rights to the waters of the Truckee River and its tributaries, and fixing the priorities and amount of water needed by the defendants under their appropriations for power plants, irrigation, storage, municipal, and other purposes; to secure for the Indians at the Pyramid Lake Reservation a reasonable amount for their needs, and to allow the government to divert, store and deliver the residue to the extent needed by homesteaders and users on the Reclamation Project. The complaint required the defendants to set up and show their claims and asked for a decree quieting rights.

The State of Nevada was not made a party to this action because of the necessity of bringing the case in the Supreme Court of the United States if the State were made a defendant. The State is using water through ditches which supply some of the defendants. The amounts of water to which the State is entitled for the hospital for mental diseases, University stock farm, agricultural experiment station, and fish hatchery have been estimated for purposes of administration, and on the same basis as the rights of the defendants.

As soon as the solicitors and engineers for the government became prepared for trial the taking of evidence began before the Judge of this court, Hon. E. S. Farrington, on the 4th day of August, 1919. Later it appeared that so many rights were involved and the introduction

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of testimony would be so extended that if heard personally by the Judge the trial of criminal and civil cases, conducting of other business, and the duties of this court would be long and unduly delayed. Thereupon the court found that an exceptional condition existed requiring reference to a master. Accordingly on October 14, 1919 the court appointed the undersigned, George F. Talbot, Special Master in this case, to continue the taking of testimony, give consideration to all the evidence, and report the same with recommendations "as to conclusions of fact and of law, and as to form and substance of the decree to be entered." Thereupon the taking of testimony proceeded before the Special Master. His Honor, Judge Farrington sat with the Special Master and listened to the general arguments which consumed eleven days in September, 1922.

Thereafter the water rights involved were under consideration by the Special Master for the greater part of nearly two years. Upon the completion of his proposed findings, and on July 24, 1924, written notices were mailed to counsel stating that "all parties and solicitors desiring to examine the findings and form of decree tentatively proposed by George F. Talbot, Special Master, and to be informed regarding the time for offering objections and modification thereto, are requested to appear at District Court Room No. 2 in the Court House in the City of Reno, Nevada at 11 o'clock, A.M. on Saturday, July 26, 1924."

At that time and place attorneys appeared for the defendants, and to them it was announced that the findings and form of decree tentatively proposed by the Special Master were ready for publication and examination, and that copies thereof would be placed immediately in the offices of the designated attorneys. On the same day copies were delivered to the United States Attorney, and forwarded to the Special Assistant to the Attorney-General in charge of the case for the United States.

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All parties were allowed until August 15, 1924 for offering amendments and taking exceptions to the findings and form of decree tentatively proposed. Upon request of numerous defendants and due showing of necessity upon their behalf this time was extended to September 1st, and again to and including September 15, 1924.

There were presented by that date one exception to the proposed decree by the United States, and thirty-six sets of exceptions were filed stating general objections on behalf of most of the defendants, and special objections relating to many of their rights, and requests for modifications of the proposed findings and form of decree. Pursuant to notice given in August the argument upon these exceptions and desired modifications began in Reno on September 22, 1924, and continued for eight days. Because of the objections of some of the attorneys Judge Farrington did not sit with the Special Master during this argument. The taking of evidence and hearing arguments have been in Reno for the purpose of saving the many hundreds of litigants and witnesses trips to Carson City.

The exceptions and objections so filed and argued on behalf of the combined water users assert that the Special Master has overlooked the principle of the law of prior appropriation; that the priority given the United States for its Indian lands is erroneous; that by the doctrine of relation water is allowed for the lands under the Truckee-Carson or Newlands Project, and not allowed to the defendants for irrigable lands not heretofore reclaimed; that an excess amount of water is allowed for diversion through the Derby Dam by the government and for lands not yet reclaimed in the reclamation project; that the proposed findings failed to provide any time in which the United States Reclamation Service is required to make beneficial use of the water; that the amount of water in acre feet allotted to the defendants is insufficient for their needs, and should be increased to 6½ acre feet for the irrigating season; that the limitation of the

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use in any one month to 28% of the season's allowance of water for irrigation is a depredation of property rights, revolutionary and destructive; that the seasonal acre foot allowances are restrictive and amount to a confiscation of defendants vested rights to economic use within their respective appropriations and priorities, allow an insufficient amount of water when available to produce on their lands maximum crop production; that the right proposed to allow the Government under claim No. 4 attempts to apply the force of a decree heretofore rendered which grew out of litigation to which these defendants were not parties; that water was improperly allowed for the Pyramid Lake Indian Reservation upon a priority date December 18, 1859, the date of the withdrawal of the lands for the reservation and that no priority should be granted to the Indians earlier than the date of the confirmation of the reservation of the lands by the order of the President, March 23, 1874; that 4½ acre feet is an insufficient amount of water for the proper irrigation of crops as shown by the application of that quantity of water under the Orr Ditch in the year 1924; that the proposed findings fail to allow the amount of water which has been diverted and used by the defendants upon their lands; that the approximate diversion and estimated transit losses as stated in the proposed findings are too low and should be increased at least 25%.

The extent of these objections and the exceptions relating especially to various rights are better shown by reference to the exceptions presented and on file.

By the last argument these general and many special questions regarding the rights of the parties in this action were presented and in some instances more carefully than they had been before. Rights under conflicting judgments and claims for more land, more water, and irrigation priorities were strongly urged. Later many hearings and conferences were given to contending defendants and by reason of these their rights became more

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clearly apparent. Efforts for conciliation were made and compromises obtained, so that rights could be more accurately and satisfactorily determined and trouble and expenses for litigants and the time of the court saved in the future.

Some of the defendants regard this suit as an imposition. This is a mistake, for on the contrary it is one of the best things that ever happened to the water users. The cultivated lands are estimated to be worth from $200 to $300 per acre and some near the City of Reno $500 per acre, and nearly all of their value, aggregating millions of dollars, is in the water rights. They have obtained patents, deeds, and abstracts for the land, but the most of them, and especially those who have been free from litigation, have nothing of record showing the extent of their water rights which constitute the most of the value of their holdings, for land is abundant and dependent upon the right to the water which is worth several times more than the land without water. The most of these vested rights were initiated long before there were any state statutes or laws requiring application to a State Engineer, permits or recording, and were acquired merely by diverting and using the water, in some cases aided by notices of intention, and have remained dependent largely upon the memory of witnesses, nearly all of whom have gone. Better evidence could have been obtained and more satisfactory determinations made many years ago. It is important to the parties and the public to have defendants rights so defined in judgments that they will be assured of reasonable quantities of water for their uses, that waste may be prevented and the surplus water given to later appropriators, or allowed for reclamation projects to the end that agricultural production may be increased and that there may be fertility in places where there is now desert waste. A decree in this case should allow and fix as a valuable asset for all time every water right involved so definitely that uncertainty and future litigation will be avoided, that every owner

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will know what he has to use, to sell, or to leave to his heirs, and that every purchaser may feel safe in buying.

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GOVERNMENT RIGHTS

PYRAMID LAKE INDIANS

The Indians were not so unfriendly or active in committing depredations upon the first coming of the white men, or until they were so numerous as to encroach materially upon the territory, and means of support which the Indians had long enjoyed without molestation. After the discovery of the Comstock Lode in 1859, which was after there had been a flow of emigration to California through Nevada for ten years, there was an influx of people to this part of the state then called Washoe. The game which had been plentiful for the Indians was being killed and driven away and the pinenut trees which had provided a part of their sustenance were being cut down. In May 1860 nine Indians killed the men at William's Station near Dayton. Major Ormsby and his companies went in pursuit, and seeking to capture or destroy the Indians, he and a large number of his followers on May 12, 1860 were killed in the fight near the lower end of the Truckee River on lands in the Pyramid Lake Indian Reservation, withdrawn by order of the Commissioner of the General Land Office dated December 8, 1859, pursuant to the request of the Commissioner of Indian Affairs on November 29, 1859. The fight began about half a mile from where the Indian Agency buildings are now situated. On the previous Sunday five white men had been hunting within the reservation.

On or about the second day of June 1860 Col. Jack Hayes and his company avenged the death of Major Ormsby and companions, but remnants of the Indians remained upon the reservation lands. The withdrawal of these lands for the Indians was so ordered a year and a

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half before the fight, but the executive order by President Grant was not made until March 23, 1874. In the meantime the Civil War had occupied the attention of the government, and it required months to communicate between here and Washington. The Commissioner of the General Land Office has frequently reserved land for different purposes. The executive order of the president withdrawing and setting apart the lands for the Indians became effective as of the date the lands were withdrawn by the Commissioner of the General Land Office in 1859. Withdrawals of lands would not serve their purpose if executive orders did not relate back to the time the withdrawals were made. At that time the rights of the defendants or of the appropriators of water from the river had not been initiated, the state had not come into existence, no one owned any of the water but the government. If any law applied it was the riparian, which required the water to flow down the channel to the lands of the reservation, which are the lowest on the river. The act of 1866 permitting rights to be acquired by appropriation had not been passed. But if it be conceded that the riparian law did not apply or control, the withdrawal of the land for the reservation for the use and benefit of the Indians necessarily implied the withdrawal of a reasonable amount of water for the needs of the Indians.

Congress has passed an act providing for the allotment of a meager five acres per Indian. Why should anyone begrudge or object to allowing enough water for irrigation by the Indians of these small tracts of land, and of the land they have under cultivation? Under similar conditions white men are not satisfied to try and make a living on such a small amount. Under the Homestead and Preemption Acts they have been permitted to obtain 160 acres, and under the Desert Act a section, or 640 acres, with water. And so long as its two million grant lasted this state sold 640 acres to each applicant, and every member of the family whether of age or not could buy that amount at $1.25 per acre.

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In this arid climate where crops cannot be grown without irrigation some homesteaders have struggled with eighty or one hundred and sixty acres with water. A white man cannot make a living on a thousand acres without water. A meager five acres per capita for the Indians without water would be fit only for a starvation camp and burying ground. It cannot be presumed by a court of justice that a great and humane Government contemplated such a fate for the helpless remnants of a race which is vanishing rapidly since deprived of a vast territory which before the coming of the white people supplied ample game, fish, pine nuts and easy means for their humble living. "To him who hath shall be given and to him who hath not shall be taken away even that which he hath." "When you take the props which support my house you take my house." "You take my life when you do take the means whereby I live." Men residing here for 50 years say the last year was dryest one they have known. Users above the reservation took all the water from the river last summer for irrigation on porous lands in the narrow valley, and the return flow was sufficient to enable the Indians to produce good crops without depriving the defendants from taking all the water above.

NEWLANDS RECLAMATION PROJECT

The Reclamation Act was approved June 17, 1902. Fifteen days later and on July 2 the United States, acting by the Secretary of the Interior, withdrew from public entry, except under the Homestead laws in accordance with the provisions of the act, the land required for the government's first reclamation project. Originally this was called the Truckee-Carson Project from the rivers supplying the water. The name had been changed to the Newlands Project in memory of Senator Newlands, who after years of effort, was instrumental in having Congress pass the reclamation act.

After the withdrawal of the lands the government proceeded with the construction of the Derby Dam across the

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Truckee River and with the construction of the Truckee Canal, with a capacity for diverting 1,500 cubic feet of water per second, running from the dam, a distance of 31 miles, to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of 250 miles of lateral and sub-lateral irrigation canals. By April 30th, 1919 the government had expended over six million dollars for the project. The lands so withdrawn for reclamation were dry and arid and without the application of water were of little or no value, but with irrigation produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriation and vested rights permitted and confirmed by the act of Congress July 26, 1866, the United States has been allowed with a priority of July 2, 1902, the date of the withdrawal of the lands for the project, the right to divert through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,000 acres of land on the project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of the cities and towns on the project, and for domestic and other purposes, and under such control, disposal and regulation as the United States may make or desire, provided, that the amount of this water allowed or used for irrigation shall not exceed per season, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands. The 1,500 cubic feet per second of water so allowed is the quantity which was claimed in the notices posted and recorded by the government about the time of beginning construction of the dam and canal. The Lahontan Dam and Reservoir are constructed across the Carson River and impound the flood and surplus waters of that stream which are supplemented by Truckee River water conveyed through the Truckee Canal. Along this

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canal water is diverted for irrigation, principally at Fernley. Of the water for the project it has been estimated that about 60% is supplied by the Truckee River and about 40% by the Carson River. These proportions may vary in different years according to the varying snowfall on the respective water sheds in the Sierra Nevada mountains which supply these rivers. As the government could reserve or take all or any part of the unappropriated water from either stream the proportion is not material to defendants having prior or vested rights. The defendants under the act of Congress of 1866 and in accordance with the state laws are fully protected and are allowed under their prior appropriations water to the extent of their needs, and as securely as if the state owned the water. As to these appropriations, they should have no concern regarding the amount of the excess or unappropriated water withdrawn by the government for conveyance through the Truckee Canal or concerning the quantity of land or number of acres to be reclaimed or irrigated, for which the government may desire to supply water on the project. There is not sufficient water for the irrigation of the 232,800 acres of land for which the water is allowed but the amount may be increased by additional storage and the water allowed for application to any part of the lands as may be desired for the benefit of the settlers.

The objections made to the allowances to the United States for the project have already been sufficiently considered in this report, in so far as it is claimed that the state owned the water. The government as the owner could withdraw ad libitum any part of the public domain or unappropriated water. The withdrawal of the lands for reclamation as authorized by the provisions of the Act carried with it by implication the reservation of unappropriated water required for the irrigation of the lands, and to the extent claimed by the notices posted and recorded in different counties by the Government. The

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withdrawal of the lands and the expenditure of millions of dollars in the construction of dams, reservoirs and canals would be entirely futile without water for the irrigation of the arid soils.

Objections to the allowance for the project has been made under Section 8 of the Reclamation Act which directs that the Secretary of the Interior, in carrying out its provisions, shall proceed in conformity with the state laws. Undoubtedly this meant protection to owners and required compliance with state laws in regard to vested water rights, with which the government has been careful to comply. There is nothing in the language of the Act indicating that the Government is required to comply with state regulations in order to withdraw, store or supply to settlers its own water. There was no state law regarding the withdrawal or regulations of the water by the government at the time the Reclamation Act was passed and the project was initiated by the government and there was no state statute requiring the posting or recording of notices, or providing for application to, or the obtaining of a permit from, the State Engineer, in order to appropriate water. At that time the right to the use of water was obtainable by appropriation for a beneficial purpose.

The government did everything which would have been necessary to entitle it to the appropriation of the water if it had belonged to the state. Upon undertaking the Truckee-Carson project notices were posted, which no state statutes then required, the work was completed with diligence, and if the enterprise had been a private one the right to the water diverted for storage and irrigation would have been complete. The construction by the Government with diligence of the Derby Dam, the Truckee Canal, Lahontan Reservoir, and 250 miles of canals and laterals and the use of the water as made would have been sufficient to establish a government right if the state

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instead of the United States had been the owner of the water.

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The United States is allowed 58.7 second feet and 12,412 acre feet annually for 3,130 acres at Pyramid Lake Indian Reservation, and if allotment be made under the act of Congress of five acres per Indian on bench lands for these approximately 2,635 acres, and for the irrigation thereof 4.1 second feet applied, and 5.59 second feet diversion. The United States is also allowed to store and discharge 3,000 cubic second feet of water at Lake Tahoe, if available, and to divert 1,500 cubic second feet of water through the Truckee Canal for storage in the Lahontan Reservoir and irrigation of 232,800 acres of land under the Newlands Reclamation Project, of which, 151,000 acres are partly supplied by Carson River water mingled with Truckee River water in Lahontan Reservoir.

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DECREE

The recommended decree has been drawn for the purpose of fixing the priorities and water rights to the Truckee River and its tributaries, and quieting the title thereto, restraining waste, and protecting all parties concerned to the extent of their priorities and needs. The restrictive provisions of the recommended temporary restraining order are similar to those in the decree, except that in the temporary restraining order they are to be in force until the further order of the court and in the decree perpetually unless modification is possible after the term. It is desirable that the decree be put on trial by the temporary restraining order for three years or more, and until it has been tested during at least one dry year. This would be proceeding to a certain extent analogously to the provisions of the state statute of 1921, allowing three years for varying water duties after recommended determinations have been made by the State Engineer and put in force by the court.

• • • •

Whenever any water user feels that he is not receiving the amount of water to which he is entitled under the decree he should . . .

* * * *

If, as recommended, the allowance provisions of the recommended decree are put on trial and any of the defendants complain that they cannot properly irrigate their land with the amount of water allowed, it is suggested that the court appoint an experienced and efficient irrigater to serve at the expense of the complaining defendant and irrigate the land for one or more seasons so that the amount really required for the proper economical irrigation of the land may be more accurately determined and so that more or less water may be allowed accordingly by final decree.

As provided in the recommended decree any of the owners should be allowed to change the form of diversion, and the place, means, manner, purpose, or use of water to which they are entitled, provided they do not injure other persons.

* * * *

/s/ George F. Talbot
GEORGE F. TALBOT
Special Master

Carson City, Nevada,
June 12th, 1925.

EXHIBIT NO. B-542

IN THE DISTRICT COURT
OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA

No. A-3.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ORR WATER DITCH COMPANY, *et al.*,
Defendants.

ETHELBERT WARD,
Special Assistant to the Attorney General,

GEORGE SPRINGMEYER,
United States Attorney,
For Plaintiff.

SARDIS SUMMERFIELD,
THATCHER & WOODBURN,
GOODFELLOW, EELS,
MOORE & ORRICK,
BROWN & BELFORD,
PRICE & HAWKINS,
COOKE, FRENCH & STODDARD,
PLATT & SANFORD,
P. A. McCARRAN,
COLE L. HARWOOD,
GEORGE S. GREEN,
WILLIAM M. KEARNEY,
JAMES T. BOYD,
S. H. ROSENTHAL,
JAMES D. FINCH,
H. WALTER HUSKEY,
For certain Defendants.

FARRINGTON, District Judge:

October 14, 1919, George F. Talbot was appointed special master in the above-entitled case. March 30, 1925, he lodged his findings with the clerk of this court, and on the 13th day of June, 1925, his general explanatory report was filed. During a period of five years and eight months he rendered 1161 days service. For this he asks compensation at the rate of $50 per day, and expenses. The expenses, including room rent, clerical assistance, etc., amount to $5,583.38; and the per diem to $58,050.00, the total being $63,633.38. Of this sum the master has received from complainant $9,875.000, leaving a balance now claimed of $53,758.38. The Government regards the claim of the master as too large, and accordingly has protested against allowance of the full amount asked, and with this protest attorneys for a number of the parties are in accord.

The action was brought "to obtain an adjudication of rights to the waters of Truckee River and its tributaries, fixing the priorities and amount of water needed by the defendants under their appropriations for power plants, irrigation, storage, municipal and other purposes, to secure for the Indians at the Pyramid Lake Reservation a reasonable amount for their needs, and to allow the Government to divert, store and deliver the residue to the extent needed by the homesteaders and users on the reclamation project." Some 806 claims to the use of such waters were investigated and determined. The transcript of the testimony covers more than 9,000 typewritten pages.

The authorities uniformly hold that the master's compensation is to be fixed by the court in the exercise of a sound judicial discretion.

Equity Rule 68 provides that "The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances

thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct."

Due consideration must not only be given to the excellence and value of the work performed, but also to the rights and equities of those upon whom the burden of payment will fall.

In Newton v. Consolidated Gas Co. (259 U.S. 101, 105), a New York case, to which reference has been repeatedly made, the court said:

> "While salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and *temporary employment* which often seriously *interferes with other undertakings.*"
>
> Although salaries paid to the members of the Court of Appeals and the Judges of the Supreme Court in the City of New York cannot "be taken as a rigid standard, they are to be considered when it becomes necessary to determine what shall be paid to an attorney called to assist the court. His duties are not more onerous or responsible than those often performed by judges."

The employment of the master in this case cannot be regarded as temporary. Furthermore, the value and nature of the private business, if any, which he was obliged to give up in order to become master, is not shown. Of approximately 1700 working days which have elapsed since the master entered upon the discharge of his duties, 1161, or 68 per cent, have been devoted to this case.

Where the time occupied by a master is short, a per diem compensation is appropriate, but where, as in this instance, the work covered a period almost equivalent to a term on the supreme bench of this state, it should be

fixed in accordance with what would be reasonable compensation for annual services. The salary of a Justice of the Supreme Court is $6,000 per year; of District Judges in Nevada from $3,000 to $7,000; and in the Federal Court, $7,500, formerly $6,000.

Considering all the circumstances, I am satisfied that a total compensation of $32,500, of which the master has already received $9,875.00, will be sufficient. For the time actually occupied this is more than the highest judicial salary paid in Nevada. $657.50 will be added for clerical assistance. The total will be $33,157.50. The amount asked for room rent cannot be allowed.

Klekamp v. Klekamp, Ann. Cas. 1918A, 663, 667.

It is due to the master to say that his task has been carefully performed, and altogether is an excellent piece of work.

There is much authority to the effect that the master's compensation may be taxed against the losing party, but here there is neither loser nor winner. Hence it should be charged to and borne by the various parties in proportion to their several interests in the controversy.

The following methods of apportioning compensation and expense of the special master have been proposed:

1. That the Government pay all.

2. That it be apportioned according to the actual or computed acreage of the respective parties.

3. That it be paid by the parties in proportion to the amount of water use allotted by the special master; and

4. That the Government pay half, the farmers one-quarter, and the Power Companies one-quarter.

I am not impressed with the argument that the Government should be required to pay all of the master's compensation. The attorney for the plaintiff states that the Gov-

ernment has already expended $80,000 in securing evidence, making surveys and plats, and preparing this case for trial. This expendituure he says is charged to the reclamation project.

There is nothing peculiar in the circumstance that the Government initiated this suit without the approval or consent of the defendants. Suits are rarely welcomed with much enthusiasm by those who are sued. The Government has expended some seven million dollars on the Newlands Reclamation Project. That it should undertake such a work for the development of this State was for many years earnestly desired and persistently urged by all our people. It was the principal object for which our senators and representatives in Washington labored through several terms. In an arid country no reclamation project could be successful if every person located up stream was permitted to take all the water he desired with no incentive to economical use, or restriction on wasteful methods, other than his own will.

When the Government was induced to come to our aid, a judicial determination of water rights on the Truckee River and the Carson River was inevitable. It was as necessary to the success of the project as ditches, canals and reservoirs. This is demonstrated by the history, volume and cost of water litigation in the courts of this State and of Washoe County during the past forty years. Furthermore, under our present water laws—and they are as good as we can devise—no title to the use of water is so definite, certain or satisfactory as one evidenced by a judicial decree. Had there been no reclamation project, and no such suit, evidence taken in this case of extravagant use of water indicates that comprehensive and careful judicial adjustment of all rights on the Truckee River could not long be postponed. The men who participated in the early appropriations are rapidly passing away, and it was and is apparent that a permanent judicial record should be had without delay. This is something which

could not have escaped the pre-vision of men who advocated reclamation by the Government in Nevada.

It has been stated repeatedly that in the beginning assurances were given this was to be a friendly suit, to be ended within a few months, and at no cost to the water users. No testimony to that effect has been called to the attention of the court. It is needless to say such assurances, if given at all, must be put aside, unless it can be shown they were given by some one authorized to bind the Government. The original complaint was signed by William Woodburn, Jr., U.S. District Attorney for Nevada, and by John F. Truesdale, Special Assistant to the Attorney General. The prayer is that the United States recover its costs, and have such other, further and different relief as to the court may seem just. Every defendant must be presumed to know what the Government prayed for.

Attorneys for the Power Companies, with the approval of counsel for many other water users, have suggested that if the entire compensation of the master is not all charged to the Government, that it be apportioned according to acreage. The following is their proposed summary:

Government	232,800	acres or	75.61%
Indians	5,765	" "	1.88%
Truckee Meadow Irrigators other than Power Company	44,883	" "	14.60%
Truckee Meadow Irrigators under Power Company Ditches	2,000	" "	.65%
Five Power plants 17,159 theoretical horse power, equivalent of	17,159	" "	5.60%
Cities of Reno and Sparks, equivalent of	5,100	" "	1.66%
Total	307,707	" "	100.00%

To this scheme there are several objections. The suit was brought, not to fix the acreage of land owned by the respective parties, but to ascertain how much water each

is entitled to use. This was the controversy, and the award was an adjustment of water rights. If A has 200 acres of land and 50 inches of water, and B has 50 inches, but only half as much land, it does not follow that A's water right is worth twice as much as B's. His interest in the stream from which his water is diverted is the right to use the water.

The Government is given a flow of 60,000 inches at the Derby Dam. Such a flow is utterly inadequate to irrigate 232,800 acres of land, or more than 80,000 acres. The actual acreage to which water is being or has been applied on the Newlands Reclamation Project is probably much less. It is reported that no more than 70,000 acres, or thereabouts, have been entered by settlers.

For the power plants owned and controlled by the Truckee River Power Company, the master has awarded the use of 69,500 inches of water for power purposes. In the above summary the company is estimated to have the equivalent of only 17,159 acres of land; but in considering the value of this award we must not lose sight of the fact that it is the duty of the Government to so regulate the gates at Lake Tahoe as to give the company the use of said quantity of water in continuous flow for twelve months of the year. The amount of acreage credited to the Government, of which no more than 80,000 acres can be irrigated because only 60,000 inches of water is given, is fixed at 232,800 acres. Hence it is argued that the Government should pay thirteen and a half times as much of the costs now under consideration as the Power Company.

In view of the fact that the farmers on the Truckee Meadows have been awarded the use of about 41,000 inches, which can be used only during an irrigation season of no more than six months each year, the question arises, why should the farmers, who have the use of 41,000 inches of water for half the time, be required to pay more than

twice as much as the Power Company, which has a practically assured use of 69,500 inches all the time? The answer offered is, that the 69,500 inches after being used, is returned to the stream. But, on the other hand, we may not overlook the fact that there is a very considerable run-off and percolation from the irrigated lands, some of which, even though it may find its way to the stream too late in the season to be used by other irrigators, may yet be available for storage. The power plants are so located that further diversions from the stream above the lowest plant by parties other than the company, or without its consent, will encounter serious legal difficulties. A large flow so regulated as to be uniform and continuous throughout the year, constitutes an exceedingly valuable right. The discrimination against the farmers in favor of the power plants is not justified.

The Indians on the Pyramid Lake Indian Reservation have under irrigation no more than 3,130 acres, instead of 5,765. The difference, 2,635, is to cover a possible allotment of lands on the bench of five acres each to 527 Indians. The bench land has never been irrigated or used, and no such allotments have been made. If acreage is the basis of the apportionment, the Government's acreage should be reduced to 80,000, and for the Indians no more than 3,130 acres should be considered.

I see no reason or equity in throwing all, or the major portion of the expense thus far incurred in this litigation on the Government. While it may appear that an undue portion of the master's time has been devoted to the adjustment of disputes over comparatively small rights, it must be remembered that each claimant is interested in having the claim of every other justly and fairly determined. The work done is highly beneficial, not only to the plaintiff, but to every defendant; and while ~~they~~ there may be just cause for dissatisfaction in some instances, the master recommends that before a final decree is entered, the allowances made be tested for a reasonable time under

the direction of a competent water master, to the end that such modifications may be made as are consistent with good husbandry and the principle that actual and beneficial use shall be the measure and limit of the right.

It has been strenuously argued that the master's findings as to the duty of water are erroneous, and that the allowances to irrigators should be increased. One request was that the water users be allowed the quantity of water hitherto used, and if hereafter it is ascertained to be excessive, it can then be reduced.

To adopt either suggestion, it is believed, would result in losing much of what has been accomplished by the special master. He found that many of the defendants, but far from all, have been careful and economical in the use of water. Some testified they customarily changed the water two or three times every tweny-four hours, while others allowed it to run two or three days on the same land; and on one large ranch it was usual to let it run in one place for about six days. It was also found that many of the people buying or paying for delivery of water, irrigate with about six-tenths of an inch per acre; and that others had been producing excellent crops with half an inch of water per acre. This has not been denied. If there be waste and wasteful methods, there must be regulation, not only in the interest of the reclamation project, but for the benefit and protection of every farmer on the Truckee River system who wants and uses no more water than he is entitled to. Both by judicial decision and state statute, the appropriator is limited to the amount of water needed for beneficial purposes with economical use.

In pursuance of this policy the legislature of Nevada has limited the amount which may be diverted for direct irrigation to .01 of a cubic foot per second for each acre of land irrigated; and where water is stored, not to exceed 4 acre-feet for each acre of land to be supplied. (Stats. 1913, p.192.) This statute was followed by the State Engineer in his recent determination of water rights to

the Humboldt River. His allowance was a flow of not more than one-half of one inch per acre. In 1903, and again in 1907, the legislature provided that the maximum quantity of water which may be appropriated for irrigation purposes in this State shall not exceed 3 acre-feet per year for each acre of land supplied. The master has allowed the defendants in the present case from two to five times the flow provided by statutory enactment, and one-quarter to one-half more in acre-feet than is provided by statute.

In the Wyoming-Colorado case (259 U.S. 419, 496), one-acre-foot per acre was allowed "for the larger part of the lands, two-acre-feet for a part, and two and one-half acre-feet per acre for the remainder."

No attempt will be made in this decision to dispose of all exceptions presented by counsel, and recently argued. For the present no change will be made in the master's findings as to the duty of water.

$33,157.50 is allowed to the special master for services and expenses. This sum will be charged as costs, and taxed as follows:

Fifty per cent thereof, or $16,578.75, to complainant, for the Reclamation Project and the Pyramid Lake Indian Reservation. Complainant will be credited on the amount thus charged with $9,875.00 already paid, leaving a balance now due of $6,703.75.

Twenty-five per cent. thereof, or $8,289.37, to the Truckee River Power Company for the five power plants: Farad, right #5; Fleish, right #6; Verdi, right #7; Washoe, right #8; Reno, right #9; also for 213 acres on the Katz Ditch, rights #95 and #95a; for 10.8 acres under Hunter Creek, right #725; 12.4 acres under Washoe Power Ditch, right #96; 9.9 acres, the Smith ranch, right #100; and for the water supplied to the cities of Reno and Sparks from the Highland Ditch and

Hunter Creek, rights #98 and #226. Of this 25 per cent, no more than one-sixth is the reasonable share to be paid by the owners of the water rights employed in supplying the cities of Reno and Sparks. The entire 25 per cent. will be a charge against the Truckee River Power Company.

Twenty-five per cent., or $8,289.37, will be charged to the remaining defendants in proportion to the respective amounts of water adjudged to each.

Further details will be contained in the order following this decision.

Master's compensation	$32,500.00
Allowed for expenses (clerical assistance)	657.50
Total	$33,157.50

Taxed as costs as follows:

50% to complainant, or $16,578.75, for the Reclamation Project and the Pyramid Lake Indian Reservation.	
Credit of $9,875.00 already paid by complainant, leaving a balance of	$6,703.75
25% to the Truckee River Power Company	8,289.37
25% to the remaining defendants	8,289.37

EXHIBIT NO. B-138

DEPARTMENT OF JUSTICE
Washington, D.C.

Address Reply to
"The Attorney General"
and Refer to Initials
and Number
I.K.W.-W.W.D.
18279.

230 Post Office Building
Denver, Colorado, June —, 1925.

U.S. v. Orr Water Ditch Co.,
U.S. Court, Nevada.

The Attorney General
Washington, D.C.

Sir:

An unexpected complication has arisen regarding the Government's water rights for the Pyramid Lake Indian Reservation on account of a ruling recently made by Judge Farrington in the Walker River Indian water suit, *U.S.* v. *Walker River Irrigation District, et al.* ([Illegible.]). The facts controlling both the Pyramid Lake Indian Reservation and the Walker River Indian Reservation are practically identical. There are no treaties with these Indians, nor any early Acts of Congress relating to them. Both reservations were set aside by one order of the Commissioner of the General Land Office, on December 8, 1859. The Presidential Proclamation regarding these reservations was not issued until 1874. Special Master Talbot in U.S. v. Orr Water Ditch Co. gave to the Government the first rights for the irrigation of the Pyramid

Lake Indian lands by reservation dating from the Commissioner's order of December 8, 1859.

The Walker River Indian Water suit was prepared and filed by the United States Attorney on July 3, 1924. I have had no participation in this case other than calling the United States Attorney's attention to the evidence and printed briefs of the Government regarding water rights for the Pyramid Lake Indian Reservation. In the latter part of May, 1925, motions by the defendants to dismiss were argued before United States Judge [illegible]. When I arrived at Carson City at noon June 2, 1925, Judge Farrington called me into his chambers and told me that he had that morning entered an order in the Walker River case requiring the United States to specifically [illegible] the amount of water actually appropriated by the [illegible] of ditches and canals in 1859 for the irrigation in the lands of the Walker River Indian Reservation. I thanked the Judge for his information, but did not attempt to cross-question him as to his reasons for so ruling. I considered it a warning on his part in order that I might be prepared to meet the situation on July 10, when the exceptions are argued objecting to the first water rights awarded the Government for the Pyramid Lake Indian Reservation.

It would seem that the Judge at present thinks that the rule in the Winters case does not apply to either the Walker River Indian Reservation or the Pyramid Lake Indian Reservation. I see no other reason for his ruling requiring the Government to show an actual appropriation by construction of ditches in 1859. As a matter of fact I understand it was a long time after 1859 before any irrigation ditches were constructed for the irrigation of Indian lands on either reservation.

This complication means more work on my part between now and July 10 than I had anticipated. I shall do my

best to make Judge Farrington change his mind, and adopt the views of the Special Master, Judge Talbot.

Very respectfully,

/s/ Ethelbert Meritt
ETHELBERT MERITT
Special Assistant to the
Attorney General.

EW/ELM

EXHIBIT NO. A-90805 S

Admitted Nov. 18, 1975

S-1142

DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN SERVICE

Carson Indian School,
Stewart, Nevada,
March 22, 1926.

Judge E. S. Farrington,
U.S. Court,
Carson City, Nevada.

Dear Judge Farrington:—

I am writing you to find out if some arrangement can be made to allow the entire flow of Truckee River to run into Pyramid for a period of about two weeks.

My reason for requesting this is that there is so little water in the Truckee River below the Derby Dam that trout and other fish in the Pyramid Lake cannot get up the river to spawn. The Indians depend to a great extent upon the fish in Pyramid Lake for a livelihood and to them the question of water in the river is a very serious matter.

In past years I believe the United States Reclamation Service arranged to have the entire flow of the River run into Pyramid Lake for a short period in the Spring—the spawning season for fish—but Mr. Richardson, Superintendent of the Newlands Projecs, informs me that the turning of the water into Pyramid Lake is now a matter to be handled by the United States Court.

Toward the latter end of last week there was more water running down the river and reaching Pyramid Lake than at any time during the winter. This was due to the warm weather which melted the snows in the mountins and there was more water at the Derby Dam than the canal conveying the water to the Lahontan Reser-

voir could carry, and consequently some was allowed to pass the Dam and run into Pyramid Lake. There was enough water running into the lake to allow the trout to get into the river and some were going up the fish ladder at the Indian Dam a few miles from the mouth of the river.

The Indians have been asking all winter to have the waters of the Truckee River allowed to flow into the lake for a period of two weeks at this time of the year, and I trust the justice of their request is sufficiently apparent to allow favorable action.

The trout in the Lake must go up the river to spawn at this time of the year, and unless there is sufficient water running into the lake the fish cannot enter the river on account of the bars at its mouth.

I shall appreciate whatever you may be able to do in arranging that the Truckee River may be allowed to flow into the Lake for a two week's period now, as the trout are beginning to spawn. A little later other fish go up the river also to spawn.

Very respectfully,

/s/ [Illegible]
Superintendent.

FS:LP

EXHIBIT NO. A-20193A

5-1142

DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN SERVICE

Carson Indian School,
Stewart, Nevada,
March 25, 1926.

Commissioner of Indian Affairs,
Washington, D.C.

Sir:

I hereby confirm my telegram of March 14, 1926, as follows:

> "In accordance with past custom permission was granted State Fish Hatchery to take spawn from Pyraimd Lake Reservation. Indians now protest. Held four-hour conference with them yesterday answering their objections and trying to convince them that it is to their advantage to have spawn taken. They strenuously object and threaten to remove Fish Hatchery Camp from reservation. State Hatchery plants approximately three hundred thousand fish annually in lake and in my opinion most advantageous to have this work continued. Im unwilling to rescind permit given hatchery unless it is Office policy to follow wishes of Indians in this matter. Activities temporarily suspended. Please wire instructions immediately as Superintendent Fish Hatchery on ground awaiting decision."

In further explanation of the matter of granting a permit to the Nevada State Fish Hatchery to take spawn from the Pyramid Lake Reservation, I wish to say that this permission has been granted the State Hatchery for several years, with the understanding that they

plant in Pyramid Lake approximately 300,000 fish annually, which they have been doing.

The Indians made no objection this year to this permit as long as the State Fish Hatchery men were attempting to get fish near their irrigation dam on Truckee River a few miles from its mouth. Due to the very small flow of water in the Truckee River when it reaches the Reservation the fish were unable to get up the river, so the men moved their camp to a spot on the lake where the river empties into it. Here they intended to use nets to take fish for spawn from the lake, when the Indians appeared and ordered them off the Reservation.

I went to the Reservation and met the Indians in conference and asked them to explain their objections to the State Fish Hatchery taking spawn. They stated that they did not wish them on the reservation; that the fish spawned and propagated in the lake and they did not need any planted in it and that the State Fish Hatchery sent many of the fish they hatched from Pyramid Lake spawn to other places.

I am informed by the State Fish Commission here, and others, that the trout do not propagate in Pyramid Lake, that it is necessary for them to find favorable conditions in the river to spawn and hatch, and on account of the small amount of water in the Truckee River below the Derby Dam it is difficult for the fish to get up the river, and in order to keep the lake stocked with trout, it is necessary to take spawn, hatch the fish and plant them back in the lake. The State is interested in keeping Pyramid Lake stocked with fish, not merely as a food supply for the Indians, but in order that the lake may continue to be noted as a good fishing place.

While many of the more progressive Indians on the reservation know this and do not object, there are so many of them that are opposing the taking of spawn that the matter has been brought to an issue.

My view of the matter is this:

I believe that the State Fish Hatchery is doing an excellent work for the Indians in taking spawn from the reservation, and planting 300,000 or 400,000 young trout in the lake annually from the spawn taken; that at any rate they are doing no harm to the Indians, as only about 400 or 500 fish are needed for spawn, and they are put back in the lake uninjured, after the spawn is taken from them.

Because I could not see any good reason why the State should not be permitted to take spawn some of the Indians stated that I was not helping them and that it was my place to take their side, and that they have been told that they have the right to decide matters of this kind, and that they would write or wire the Indian Office at Washington to instruct me to revoke the permit that I had given the State Fish Commission.

I believe the Indians are prejudiced in their feeling concerning this matter and that they may have some other motives back of their objections to having the Fish Hatchery take spawn from the lake, which they would not make clear to me.

On receipt of Office telegram of March 18, 1926, instructing me to revoke the permit granted the State Fish Hatchery, I visited Pyramid Lake Reservation and again had a conference with the Indians.

I asked them if they had thought over the matter of allowing the State to take spawn, and when I found that no diplomacy, tact or reason could make them see that it was to their advantage to continue the taking of spawn and planting fish in the lake, I told them that I would comply with their wishes in the matter and request the representatives of the State Fish Hatchery to leave the reservation. I reminded the Indians that they would be the greatest sufferers by reason of this action on their part as, in my opinion, it will not be long before Pyramid Lake will be depleted of trout.

One of the factors that enters into this fish question is the serious lack of water in the Truckee river when it reaches the lake. The main stream is diverted into the Lahonton Reservoir, and, in my opinion, arrangements should be made whereby the full flow of the Truckee should run into Pyramid Lake for a period of at least two weeks at spawning time, and I am in hopes that if such arrangement cannot be made by me this spring, the Office will take steps looking to a permanent arrangement of this kind, if possible.

I enclose herewith copies of letters addressed to Mr. George Springmeyer, U.S. District Attorney, and Judge E. S. Farrington, of the Federal Court at Carson City, in reference to this matter.

I enclose also newspaper clippings bearing on the fish situation at Pyramid Lake Reservation.

Very respectfully,

/s/ [Illegible]
Superintendent.

FS:EP
encl.

EXHIBIT NO. B-158

62472
5—1100

Refer in reply to the Following:
Irrigation
[Illegible]

Address only the
Commissioner of Indian Affairs

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

Washington

Mar. 30, 1926

Mr. Frederic Snyder,
Supt., Carson School.

My dear Mr. Snyder:

The Office has before it your letter of February 15 with which you transmitted the report of the committee appointed to appraise lands on the Pyramid Lake Indian Reservation that are susceptible of irrigation under the Spanish Springs Extension of the Newlands project. The Office also has your letter of February 26 with which you sent a protest signed by 154 adult Indians of the reservation protesting against the sale of any of their lands for the purpose of this project or otherwise.

The question for you and for this Office to decide is what the Indians ought to do or the Government ought to do for them in this whole matter. There are not before the Office sufficient data to make this decision in detail, but the general question can be discussed and the points with regard to which further facts are needed can be indicated.

In the Truckee River adjudication suit, so-called (United States v. Orr Water Ditch Company), it is understood a decree has recently been entered by the United States District Court and that this decree conforms to the findings and recommendations made by the master. Our recollection is that the master recommended that the Government be given on behalf of the Pyramid Lake Reservation a first priority in the waters of the Truckee River in accordance with the Government's claim made in its brief; but that the Government's claim for a second priority was denied. This second claim was for 54.9 second feet of water to be diverted from the river by the Derby Dam and used to irrigate lands which might be allotted to the 527 Indians of the reservation under the Act of April 21, 1904 (33 Stats. 225). This water would be used on 2635 acres of land which would be distinct from the lands comprised in the existing Indian irrigation project and which are irrigated in part by existing canals with water carried by the first priority claimed by the Government. This first priority is, as the Office understands it, for 40 second feet with the date of December 8, 1859, and is for 3,130 acres of bottom lands.

It is requested that you check up the facts above given to see that we have correctly stated the situation. A copy of the decree or the original can doubtless be examined in the office of the clerk of the Federal court at Carson City. When making this check please find out from the United States attorney or the clerk of the court whether any appeal from the decision of the District court has as yet been made, and find out from the United States attorney whether he thinks an appeal is likely to be made, if none has been taken already.

It is our understanding that the Government attorneys feel that the decree giving this first priority for the Indians ought to be and probably will be upheld in toto upon any appeal. However, of course, that is a thing

it would be unwise to count upon absolutely. The Government feels that the decree in this respect is based upon sound principles of law. The only thing to be kept in mind in this regard is that nothing can be said to be finally settled connected with a matter in litigation until that litigation is actually ended.

The Office feels, and we understand that it is your view also, that if this decree giving this priority is upheld as we expect it to be, it will give ample water for the irrigation of the 3,130 acres of bottom lands contained in the existing Indian irrigation project. The idea is that this amount of water is sufficient and that under the stream flow conditions of the river, the full amount of water carried by this priority will always be available as a matter of fact. This is so because under the so-called Lake Tahoe decree the Government has a right to insist that the river be maintained from storage in Lake Tahoe at 400 second feet in the winter and 500 second feet in the summer. This gives ample water to satisfy this priority in full at all times. Furthermore, there should be no legal or practical difficulty in actually having this water available at the head of the Indian ditch. Now that a decree has been entered the court will enforce it, and if there is any failure in that regard you should report it promptly to this Office so that appropriate steps can be taken upon this Department's suggestion to the Department of Justice to have the decree enforced.

It is undestood that it is your view, and it is one in which this Office is inclined to concur, that the 3,130 acres of bottom lands above referred to are sufficient when unallotted and will be sufficient when allotted to satisfy fully the needs and desires of the Indians for agricultural lands.

On this account it is thought to be unnecessary and unwise to obtain additional irrigated lands for these Indians. The only thing they might possibly need would be

an additional water supply for the same lands, and they would need that only in the event that the priority given by the court decree above mentioned is cut down as a result of appeals, a thing deemed extremely unlikely.

It follows from the foregoing that the Indians should not be advised or urged to accept allotments under the Act of April 21, 1904, but it might possibly be wise for them to retain the right to take such allotments during a limited period of time provided any of their lands were offered for sale to come under the Spanish Springs Extention of the Newlands Project.

The main question to consider with regard to this Spanish Springs Extension is whether the Indians should sell certain of their lands to come under that project, and if so what lands should be sold and at what price. Your letter reports that the present feeling of the Indians is against any such sale; they say that they are unwilling to sell their lands at all because they want to keep their reservation intact. This is the general feeling with regard to the reservation that they seem to have at the present time. There is, however, a more specific feeling against such a sale. It is that if the Spanish Springs Extension is made it will involve the still further storing of Truckee River water and, in the Indians' view, will tend to dry up Pyramid Lake and the Truckee River. The Indians of course originally settled about this lake on account of the fishing and it is understood that they now gain a large part of their livelihood from the lake in that way, both by getting fish for their own use and for sale. They say that the lake has receded in recent years and that the low state of the Truckee River has interfered with the spawning of the fish. They attribute this condition in a large measure to irrigation uses of the river water and feel that if irrigation is extended the river and the lake will both be lowered.

One of the fears of the Indians which you state in your letter is that they fear the carrying out of the Spanish Springs project will diminish the supply of water available to them for the lands they now irrigate or wish to irrigate under their present project. This fear, for the reason explained above, is absolutely unfounded. If the decree of the court is upehld, as it probably will be, it certainly can be enforced and the Indians will have ample water for this particular project of theirs. It is realized that the Indians and those in charge of the reservation have had difficulty in the past in getting the water at their headgates to which they have always been entitled. This difficulty was due to the lack of any decree defining their rights. From now on there should be no trouble at all with regard to this and it should be seen to that the Indians get their full supply of water.

With regard to their broader contention that the Spanish Springs project will lower the lake and the river and make both less valuable for fishing, these considerations occur to us. The watershed of the lake is apparently a large one. This, taken in connection with the area and depth of the lake, indicates that the lake only receives a part of its supply from the Truckee River. Very likely the present low stage of the lake is in large part due to the long continued drought in that whole region and in fact throughout the Great Basin. We have not before us the figures as to the capacity of the proposed Spanish Springs reservoir, but it seems unlikely that the storage of water in that reservoir would have a great effect upon the level of Pyramid Lake.

Even if storing water at Spanish Springs and irrigating lands under the Spanish Springs Extension would adversely affect Pyramid Lake and the Truckee River from a fishing standpoint, it would seem to be unwise for the Indians on that account to refuse to sell some of their lands to be taken into that project. The value of

Pyramid Lake and also Winnemucca Lake, a part of which is also in the reservation, is of course considerable both on account of fishing and as a breeding place and refuge for birds. The Indians desire to maintain these lakes is of course appreciated. In the first place, however, if it should be deemed desirable that the Spanish Springs project should be abandoned by the Government because of the possibility or likelihood that it would injure these lakes for these purposes, the matter should be taken up by the Government in a direct way. The right way to go about it would not be either for the Government or for the Indians to attempt to stop the project by refusing to allow the Indian reservation lands to be irrigated under it.

The Office sees no reason to think that the Spanish Springs project is unwise or that it ought to be blocked in any way. We feel that the Indians would be wise to assume that Truckee River water will be used practically as far as it can be for irrigation, and that the thing for the Indians to do is, if possible, instead of trying to stop such development to direct it so that it will inure to their benefit.

As we understand it the Spanish Springs project can and will go ahead, even if no reservation lands are included. If it does go ahead without the Indian lands the lands which will be irrigated will be upon the south side of the Truckee River, and as we understand it will be for the most part remote from that river and in the drainage of the Carson River and the Carson sink. This means that in these circumstances the waste seepage and return flow of the water diverted to such lands for irrigation would all go into the Carson River or Carson sink, and would be lost irretrievably to the Truckee River and Pyramid Lake.

On the other hand, if this project contains, as we understand it is estimated that it will, some 40,000 acres of land and some 20,000 acres of that land are on the

Pyramid Reservation, the situation will be more favorable to the interests of the Indians. For a considerable distance through the reservation the Truckee River flows in a deep valley; from this valley the land rises on the west very abruptly to a mesa which slopes up to the hills. It is on this mesa as we understand it that much of the land is situated which it is expected will be brought into the project. The slope of the land on the surface is such that water poured on it would in part soon find its way into the Truckee River and Pyramid Lake. All of the lands whether on this bench or not which would be taken into the project from the Indian reservation would drain into this river and lake. The result is that to the extent the Indian lands make up the lands of this project, the waste, seepage, and return flow will go into the Truckee River and Pyramid Lake and will contribute their share to supporting those waters. To the extent that the return flow waters would come into the river rather than directly into the lake, and to the extent that using them for irrigation on the lands above would cause a lag in their return to the river, these waters would hold up the Truckee River itself within the reservation and would tend to make better spawning grounds for the fish or a better water way for the fish to use in reaching their spawning beds farther up the stream.

The feeling of the Indians that their reservation should be held intact and allowed to remain as it is, is of course understandable. On the other hand if their ultimate welfare depends in part upon their being able to hold their own in a civilized world, taking part in the ordinary life and responsibilities of citizens, and ultimately protecting themselves and their property in such a civilization, they should look forward to a different means of livelihood, in part at least, from their ancestral one, of fishing and hunting. They should expect not only to farm their allotments but also to do other sorts of work and have other ways of making a living. This means, of course, that they should also look forward

to the day when they will have individual property and to conditions under which it will be impossible for them to maintain their reservation intact and as an isolated domain on which to fish and hunt, graze cattle, and conduct only a few small farms. When the Indians do come to a more advanced stage, the proximity of settlements with their schools, markets, and other advantages, including opportunities for work, it will be a great benefit to have a very considerable area of their reservation given over to these purposes.

The Office has not yet been able to fully check up the appraisement that you submitted to form a judgment as to what lands should be included in the Spanish Springs Extension. A map should be available showing the location of those which were appraised and their relation to the lands of the existing Indian irrigation project. It is assumed that none of these latter was appraised. The Office is unable to judge as to the prices fixed, except of course through the recommendation of yourself. A glance at the appraisement made for this project for railroad lands seems to indicate that those lands were given higher values. We understand that private lands to be taken into the project have not yet been appraised. It is thought that the Office should have a report comparing the appraisement of Indian lands with that of the railroad lands and if possible with the appraisement made of private lands so as to be able to judge whether the sums fixed for Indian lands are adequate in a comparative as well as in an absolute way.

In considering the advisability of selling reservation lands for project purposes, we should have in mind the desirability of making no such sale until we can be well assured that the project will be put through. One of the primary purposes, in fact the only purpose of selling the lands would be to have them irrigated, and every precaution should be made, both in the way of finding out the status and the prospects of the Spanish Springs

project and by way of protecting the matter in any legislation which would authorize the sale of these lands to insure this result. You will discuss the contents of this letter with the Indians and obtain their further views on the matter. Such views should be submitted to the Office with the other information desired.

Very truly yours,

/s/ Chris H. Burke
Commissioner.

PLAINTIFF'S EXHIBIT U-205

Admitted Nov. 24, 1975

WHEREAS: The Commissioner of the Bureau of Indian Affairs and the Superintendent of the Carson Indian School have requested the Bureau of Reclamation to arrange each year for the release of sufficient water down the Truckee River for a period of about two weeks around the first of April so that fish from Pyramid Lake may ascend the river to spawn, and

WHEREAS, the water supply from the Truckee and Carson Rivers has been insufficient during two of the past three years for the irrigation of project lands and to provide stored water no insurance against shortage during the future and the water users have been put to considerable expense for pumping of water on account of the shortage, and

WHEREAS, the Superintendent of the Newlands Project has been instructed to refer the matter to the project water users.

BE IT THEREFORE RESOLVED: That the Board of Directors of the Truckee-Carson Irrigation District, as representing the project water users, does not approve of turning water down the Truckee River to Pyramid Lake at any time when such water is required for irrigation and may be beneficially used, or when the prospects seem to indicate that there may not be an ample water supply.

I, L. V. Pinger, Secretary of the Board of Directors of the Truckee-Carson Irrigation District do hereby certify that the above and foregoing is a true and correct copy of a resolution adopted by the Directors of said Board at the regular meeting held on October 4, 1926.

L. V. PINGER

Secretary Truckee-Carson Irrigation District.

PLAINTIFF'S EXHIBIT U-214

BMP-GAI 182979. Admitted Nov. 24, 1975

DEPARTMENT OF JUSTICE
Washington, D.C.

230 Postoffice Building,
Denver, Colorado, April 13, 1928.

U.S. v. Orr Water Ditch Co., et al.,
U.S. Court, Nevada.

The Attorney General,
Washington, D.C.

Sir:

In your letter of April 4, 1928, regarding the above matter you say:

> "Findings of fact and a proposed decree it appears have been prepared and submitted to the Federal Court, but no action has up to the present been taken in the matter of ultimate determination of the water rights involved in the suit. What will be the effect now upon this situation in view of the retirement of Judge Farrington?"

A temporary restraining order embodying verbatim all the provisions of the proposed decree submitted by Judge Talbot was entered by the Court in 1925, with the understanding that the same would be enforced by the Water Master during three irrigation seasons in order to determine whether or not the amounts of water provided in the proposed decree and temporary restraining order were sufficient for proper irrigation of the lands involved. The three years period will expire in the Fall of 1898. Very little could be done towards the proper enforcement of the decree during the irrigation season of 1926. During

the irrigation season of 1927 there was an abundant supply of water and there was no need of a careful restriction of the use of water or the enforcement of the rotation provisions. The present irrigation season of 1928 promises to be one in which there will be a shortage of water, which will require a careful enforcement of the restraining order in order to demonstrate that the Master's proposed decree is not only workable, but provides for the only method to prevent waste and to enable the irrigation of a great deal more land than was possible under the former wasteful methods of use.

The Newlands Project concerning which this temporary restraining order was entered has now been practically turned over to the Truckee-Carson Irrigation District. I have been informed that the Water Master, Mr. Dukes, is considering asking the Court to continue the temporary restraining order a year or more longer in order to give him an opportunity to test it out thoroughly. I also understand that the Truckee-Carson Irrigation District is quite anxious to have the matter closed and a final decree entered at the close of the present irrigation season. One reason for the District's desire is the fear that Judge Farrington may not be in a situation to enter the final decree prepared by Judge Talbot. It is believed that Judge Farrington will enter the decree exactly as prepared by Judge Talbot. This decree fully sustains all of the claims of the Government, and, in addition to that, is, in my opinion, the best water decree that I have ever seen.

I have been unofficially informed that the President has transmitted to the Senate his nomination of Judge Norcross for United States Judge for Nevada to succeed Judge Farrington, who I understand has announced his retirement to take effect when his successor is appointed and qualified. I hope that Judge Farrington has retired rather than resigned. His retirement would permit him, if he so desires, to retain the above case and to enter the Final Decree. Judge Norcross is undoubtedly disqualified

from acting in this case for the reason that he appeared before the Special Master, Judge Talbot, and argued strenuously against the claims of the Government for an 1859 right for the lands of the Pyramid Lake Indian Reservation.

If Judge Farrington has not resigned, but merely has retired, I believe that a letter from the Department requesting him to retain the Orr Water Ditch case will be complied with by Judge Farrington. I sincerely trust that this may be accomplished. Otherwise, a Judge from another District will have to close up that case.

Since dictating the above, I have received from Special Assistant Harwood a telegram as follows:

> "The Judge is retiring only. Has given some indications not to me but to others of desire to drop the suits. Not sure whether this extends to Truckee River. Think it important you immediately take action suggested last paragraph your letter April fifth covering all these cases. Telegram or letter from Attorney General if sent at once might accomplish result."

I am sending a night letter to the Department, a copy of which is enclosed. I would like very much to see Judge Farrington retain the Walker River case, but I think it is imperative for him to retain the Truckee River case and enter final decree.

Very respectfully,

/s/ Ethelbert Ward
ETHELBERT WARD,
Special Assistant to the
Attorney General.

Copy to
Mr. Harwood.

EW/ELM
Copy night letter enclosed.

EXHIBIT NO. A-50191-B

Mar. 28, 1929

My dear Dr. Mead:

We have received the following telegram from the Superintendent of the Indian Agency at Carson City, Nevada:

> Reno civic clubs strongly protesting against small amount of water allowed to pass Derby Dam to enter Pyramid Lake resulting in fish attempting to enter mouth of river being stranded in shallow water. Thousands reported killed in this manner. Declaration office at Fallon unwilling to release Truckee waters for few days to help situation. Reno people believe Commissioner might obtain permission from Reclamation Bureau in Washington for few days run of water into Pyramid Lake thus allowing trout to get up river to spawn. Situation serious and prompt action urgent. Please advise.

If you can arrange to allow the waters of the Truckee River to enter the Lake for a few days, as suggested in the telegram, in order to relieve the situation, we would appreciate it very much. Kindly advise the action taken.

Very truly yours,

/s/ E. B. Meritt,
E. B. MERITT,
Assistant Commissioner.

3 Dec. 27

Copy to Corica School.

Hon. Elwood Mead,
Commissioner, Bureau of Reclamation.

PLAINTIFF'S EXHIBIT U-223

THE SECRETARY OF THE INTERIOR
Washington

August 21, 1929.

Hon. Tasker L. Oddie,
United States Senate.

My dear Senator Oddie:

A copy of your letter of July 23 to the President, and other papers regarding fishing conditions in Truckee and Walker Rivers, have been referred to this Department.

We have been looking into the matter and there are inclosed herewith a memorandum from the Acting Commissioner of Reclamation and a copy of a report recently received from the Supervising Engineer at Large, Indian Service. In addition to the physical difficulties presented, the waters of Truckee River are apportioned by a decree of the Federal court, which appoints water tenders for the purpose of making the various allotments according to the terms of that decree. Inasmuch as there is at nearly all times, only enough water for irrigation purposes, it is believed that it would be most difficult, if not impossible, to obtain a portion for fish life. At any rate, in view of the decree, the matter seems to be outside the jurisdiction of this Department and I fail to see what we can do to change the existing conditions.

When the Superintendent of the Walker River Indian Reservation shall have reported on the complaint with regard to the trapping of fish, I shall advise you further in regard thereto.

Very truly yours,

/s/ Joe M. Dyess
Acting Secretary

Inclosures.

EXHIBIT NO. A-447

DEPARTMENT OF JUSTICE
Washington, D.C.

SWR—GAI
182979.

230 Postoffice Building,
Denver, Colorado, October 31, 1929.

U.S. v. Orr Water Ditch Co., et al.
U.S. Court, Nevada.

The Attorney General,
Washington, D.C.

Sir:

Beginning October 17, I had repeated conferences with United States Attorney Atkinson and Mr. Roy W. Stoddard, Attorney for the Truckee-Carson Irrigation District, relative to applying to the Court for an order making the decree final in the above case. It will be recalled that for the past four irrigation seasons the Water Master has been attempting to distribute the water in the Truckee River in accordance with the temporary decree submitted by Special Master Talbot. The temporary decree and the final decree are identical.

I found that the Irrigation District at my suggestion had employed Mr. E. P. Osgood, who was the Government's expert during the trial of this case. He had prior to my arrival made a complete examination of all the files he could find in the office of the Clerk of the Court. The most important files, however, viz: the exceptions to the Master's findings and decree and related papers, together with the briefs and memoranda that the former Judge Farrington had collected in connection with the argument of the exceptions could not be found by the Clerk. Mr. Osgood's careful investigation of the plead-

ings disclosed the fact that no claim was made by any of the defendants to water in Lake Tahoe. This is important, owing to the fact that the Attorneys for the defendants are now stating their intention to bring that question into the case when the Government asks to have the decree made final.

I went with Mr. Osgood to Carson City and spent practically all day in again checking over the mass of files in this case. After explaining to the Clerk of the Court what papers were missing he remembered that there was a large filing case in which papers from Judge Farrington's office had been filed, and these supplied the missing documents. We found that the exceptions argued before Judge Farrington were as I had stated from memory, viz: eleven sets of exceptions, mostly directed to dates of priority and amounts of water allowed. Practically all of the exceptions attack the Government's 1859 first right for the Indians of Pyramid Lake Indian Reservation. No objection was made to the date of priority and the 1500 feet awarded the Government for its Newlands Project by virtue of the reservation on July 2, 1902, by the Government of the amount of unappropriated waters needed for the Government's Project. At the time the exceptions were filed, I was rather surprised that they accepted the Government's water rights for the Reclamation Project based upon the ownership by the Government of the waters of Truckee River unappropriated at the time of its reservation, to-wit: July 2, 1902. One attorney, Mr. Kearney, filed an exception to the provision in the decree regarding stored water in Lake Tahoe to the effect that he desired that it should be made plain that the Government's priority was subject to all prior rights. The provision made in the decree does so. Another set of exceptions suggested that the paragraph in the general provisions of the decree regarding stored water including Lake Tahoe should state that stored water in Lake Tahoe should be

only that stored above elevation 6227.4 above sea level. Inasmuch as there was no testimony in the case regarding Lake Tahoe, and, further, the provisions regarding Lake Tahoe should not have been embraced in the Master's decree, it is evident that this matter should not again be brought to the attention of the Court by new pleadings after an interval of almost fifteen years.

In short, I found with the assistance of Mr. Osgood that if the new Judge who will hear the Government's application to have the decree made final will follow the well-settled practice in equity, the only matters that he can consider at this time will be a re-argument of the exceptions filed before Judge Farrington which were argued for a period of seven days. My personal talks with Judge Farrington on several occasions convinced me that he did not propose to make any changes in the decree unless it should appear during the past irrigation seasons that the amounts of water allowed in some instances were not sufficient. What Judge Farrington, who is now dead, told me of course cannot be used in argument before the outside Judge who will have to pass on this matter. As the Department knows, the present Judge Norcross is disqualified by virtue of his voluntary appearance, with my permission, to argue against the Government's claim of an 1859 priority for the Indian Reservation.

During the past four seasons the supply of water has been desperately short for three of the seasons. It is now evident that without the reclamation of new lands the water supply will not be sufficient for all the farmers on the Truckee River and the Newlands Project. All parties seem to be now convinced that additional storage is necessary. The farmers have suffered by shortage of water on the Project, and especially the old settlers on the Truckee River outside the Project. The attorneys for the old settlers have persistently circulated the report that they intend to open up the entire case as to the

Government's priorities, the duty of water, and the rights of the Government in Tahoe and especially to assert for the first time rights of the old settlers in Tahoe storage. As before stated, the Court, if it will follow the equity practice, will not permit the Tahoe matter to be brought in for the first time at this late date. The suit was filed in 1913, and the answers and so-called counterclaims were all filed in 1915 and 1916.

The old settlers are gradually realizing that what is needed is not litigation or court decrees but water in a new reservoir. To that end they had made a request upon the Truckee-Carson Water Users Association for a conference towards adjusting matters and if possible ending litigation. The old settlers of course could start litigation regarding Tahoe, but not in the present case. In my opinion, they would fail, but, so long as they are encouraged by their attorneys, there is no telling how long the new litigation might last. It is, therefore, desirable that they should be encouraged to settle their differences with the farmers on the Government's project.

An all-day conference was had between these conflicting claimants on October 23. I enclose herewith newspaper clippings regarding the same. Mr. Stoddard, the Water Master, Mr. Dukes, and the United States Attorney, Mr. Atkinson, are very hopeful that matters can be adjusted between the two sets of water claimants.

We, therefore, have thought best to delay the application for a new Judge to make the decree final. There will be no real delay by this because the Water Master should make a written report to the Court as to his efforts to enforce the decree under conditions of almost failure of water. Such a report is necessary for the Court's information at the time an application is made to have the decree made final. I have urged the parties interested to rush these matters as rapidly as possible, but where there are hundreds of persons interested, and necessarily

misunderstandings and differences of opinion, any agreement must of necessity consume much time. I have requested Mr. Stoddard and the United States Attorney to keep me informed as to the progress of matters and I shall promptly report to the Department.

Very respectfully,

Special Assistant to the
Attorney General.

CC to
U.S. Attorney,
Mr. Stoddard.

PLAINTIFF'S EXHIBIT U-233

Admitted Nov. 24, 1975

Lower Rochester, Nevada
March 22, 1930

Commissioner of Indian Affairs
Washington, D.C.

Sir:

In consideration of the present controversy between the Nevada Fish and Game Commission and the Indians of Pyramid Lake Reservation, allow me to say that in my opinion the larger measure of right and justice in the interest of fish conservation and Indian wellfare is being subordinated to a narrow interpretation of benevolent policy subsidiary to other interests than those of the Indians themselves.

The primal rights of the Indian include that of dominion over and disposition of hereditary preferments granted by act of government and recognized as outside the legitimate interference of people representing extraneous interests. The diversion of the waters of the river feeding the spawning beds of Pyramid Lake trout during the season of natural propagation has made the issue of the present controversy. To meet this dereliction of the government in safeguarding their ancient and natural rights and advantage, they have evidently taken umbrage and refused the white men the privilege of taking spawn for stocking other waters. The representatives of the Fish and Game commission desire to insure the survival of the Pyramid trout by planting their spawn in many lakes and streams and their insistence obtain at the expense of the assertion of the Indian prerogative of exclusive rights to the disposal of their natural resources of whatever kind which without and within the historical jurisdiction of government are recognized as paramount by disinterested parties to the vital controversy.

These Indians should at least be allowed to take and sell publicly sufficient fish to provide them a living in conformity to their needs as developed by their own conditions of life. Their moral right to the advantages which naturally and lawfully accrue to them cannot rightfully be subordinated and made incident to the demands of extraneous interests.

The Indian has been put on the defensive on any and every ground of contention. Abstract right and justice can be variously construed in keeping with the realities of need of the different parties conforming to the respective views contingent to a controversy. The ancient and hereditary spirit of the Indian people cannot with deference to eternal right and justice be treated with contumely and ignored in deference to political expediency.

The principle of fish and game conservation is by and large only incidental in Nevada to the economic organization of the whites and cannot consistently be dispensed with like intent where this dispensation conflicts with the inalienable right of the Indian to the disposition of natural advantages in his struggle for survival in the economic order. Either he must be allowed to exploit his available resources in conformity to a reasonable policy tolerating his natural proclivities or else the government should provide him with the means to relieve him of the burden of privation with which he is now afflicted. I believe his complaint that the old Indians suffer and that the young are not adequately provided for to be true.

The public policy of ignoring other people's rights except those of political partisans is not inflicted on Indians alone or confined to Nevada. I well know how the Indian feels to be unjustly ignored.

Very truly yours,

/s/ R. C. Wilton
RICHARD CLIVE WILTON

EXHIBIT NO. A-427

Admitted Mar. 31, 1976

UNITED STATES
DEPARTMENT OF THE INTERIOR

INDIAN FIELD SERVICE

A-I
16510-30
15096-29
J R V

Carson Indian School,
Stewart, Nevada.
April 22, 1930.

Commissioner of Indian Affairs,
Washington, D.C.

Dear Sir:

Reporting on the letter of Mr. R. C. Wilton relative to the controversy between the Nevada State Fish and Game Commission and the Pyramid Lake Indians, I submit the following:

In the matter of this fish controversy, the Indians have many sympathizers beside Mr. Wilton. I do not know who Mr. Wilton is, but he is probably a well-informed man and is expressing his views which are shared by many whites in Nevada.

The State Fish and Game Commission, as well as some of the sportsmen clubs, represent the Indians as unreasonable in their refusal to allow spawn to be taken from the reservation. They state that the Indians wantonly destroy fish and spawn and that they should not be allowed to sell fish out of season.

The Indians, on the other hand, point to the broken promises annually on the part of State officials in the matter of their agreement to plant fish in the lake. They also state that the fish which they take in considerable numbers at the mouth of the river in the winter and spring time become stranded as they attempt to go up the

river and would fall a prey to the pelicans and coyotes if they did not take them.

It must be remembered that on account of the diversion of the waters of the Truckee River into the Lahonton Reservoir, very little water reaches Pyramid Lake at any time, except during a freshet which in this country is rare. Consequently, the lake is receding each year, and the water in the lake is continually becoming more brackish. The Indians think it is only a matter of time when the water will be too brackish to support fish life.

With the natural means of propogation of fish destroyed in the Truckee River, the only way to keep the lake supplied with trout is to hatch the fish artificially and plant them in the lake. While there has been a pretended interest on the part of the State in keeping up the supply of fish in Pyramid Lake, in reality there has been no evidence of any sincerity in doing so, as the State has not planted any fish in the lake for years, although generous promises have been made when they have taken millions of eggs in the spring time.

What the State apparently wishes is the privilege of taking spawn from the reservation for its hatchery at Verdi and disposing of the young fish to its own advantage in any manner it wishes without any regard to the interests of Pyramid Lake. That the State is not really concerned about the alleged destruction and sale of fish by the Indians in the winter and spring time is shown by its attitude when they have been granted permission to take spawn. I am reliably informed that at such times the game wardens in the various counties are instructed to allow the Indians to sell fish with impunity, but when the Indians have hesitated to allow spawn to be taken they have been threatened with arrest and punishment. During the controversy this spring several Indians were arrested for having fish in their possession, but when the Secretary of the Interior recently directed that the

spawn should be taken under the supervision of the Federal Bureau of Fisheries, no further arrests were made, and the Indians were allowed to sell fish.

As I see the matter, the State should have no control whatever of Pyramid Lake or the fish in the lake. I believe the State law which regulates the number of fish that an Indian may sell and that makes it unlawful to have fish in his possession out of season is unconstitutional and that steps should be taken to have the law repealed.

The Indians have received in the past considerable revenue, and in some cases their livelihood has depended upon the sale of fish from their lake. It is hard for them to understand why the State should have the right to deny them the privilege of selling what they have considered their own.

While it does seem reasonable to allow the State and Federal Fish Hatcheries to take spawn under an agreement to plant fish back in the lake, the unfortunate experiences of broken promises on the part of the officials of the State Fish Hatchery and the enactment of State laws which are used as arguments to force the Indians to come to terms have brought about a very undesirable state of affairs.

In the past I have offered a solution to the fish situation on the Pyramid Lake Indian Reservation. I still believe that it would be a wise thing, if it is practicable, to establish a Federal Fish Hatchery on the Pyramid Lake Reservation for the purpose of keeping up the fish supply in the lake.

Very respectfully,

/s/ Frederic Snyder
Superintendent.

FS:G

EXHIBIT NO. B-229

Admitted May 20, 1976

IN THE DISTRICT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA

In Equity, Docket No. A3

THE UNITED STATES OF AMERICA,
Plaintiff

vs.

ORR WATER DITCH COMPANY, *et al.*,
Defendants

HARRY C. DUKES

WATER MASTER

TRUCKEE RIVER AND TRIBUTARIES

December 5th., 1931.

Honorable Thomas B. Snoddy,
Superintendent,
Pyramid Lake Agency & Sanatorium.
Nixon, Nevada.

Dear Sir:

I have your letter of December 3rd., 1931, enclosing a letter from from Acting Supervising Engineer of the Indian Irrigation Service, which pertains to a letter from Hon. Lynn J. Frazer, U.S. Senate, concerning a complaint from the Indians of the Pyramid Lake Reservation of Nevada that Pyramid Lake is drying up, and a

request that a major portion of the winter flow of the Truckee River be turned down to Pyramid Lake.

I have made some effort in the past five years to gather historical data of the water surface elevations of Pyramid Lake, and to acquire new information. The results have been tabulated and a copy is transmitted herewith. Should you or your department have other information on the subject I would be very glad to know it.

As to the request of the Indians that a major portion of the winter flow of the Truckee River be turned down to Pyramid Lake: Kindly refer to "Derby Dam and Truckee Canal" and "Lake Tahoe Storage" on pages 9 and 10 of the "Recommended Temporary Restraining Order" in the case entitled "In the District Court of the United States of America, in and for the District of Nevada, United States of America, plaintiff, vs Orr Water Ditch Company, et al, defendants, Docket No. A-3", which became a Temporary restraining order on February 13th., 1926, upon the signing thereof by Hon. E. Farrington, Judge. There it will be noted that the United States, for the Newlands Project, has the right to divert 1500 cubic feet of water per second from the flow of the Truckee River for the irrigation of 232,800 acres of land, for storage in Lahonton Reservoir, and for other purposes. Also that the United States has the right to store the waters of the Truckee River in Lake Tahoe, to the extent of 3000 cubic feet of water per second.

The present physical capacity of the Derby Canal is 850 cubic feet of water per second, of Lahanton Reservoir is 280,000 acre feet. The reservoir is empty. The present average flow of the Truckee River is 75 cubic feet of water per second, and it is not anticipated that rate of flow will be materially increased until the spring thaw begins. It would require a flow of 650 cubic feet of water per second during a period of 100 days to raise the water surface of Pyramid Lake one foot, if the effect of evaporation were otherwise provided for.

No water has issued from Lake Tahoe since March 1st., 1931, and the water surface of the lake is approximately one and one-half feet below the outlet rim, and will require the inflow of 186,000 acre feet of water, disregarding the influence of evaporation, before it will be possible to obtain an outflow of ten cubic feet of water per second. It will require an inflow of 265,000 acre feet of water before 100 cubic feet of water per second can issue, and 430,000 acre feet of water must flow in before an outflow of 500 cubic feet of water can be obtained.

From the foregoing it may readily seen that an administrator, acting under the instructions contained in the temporary restraining order, can not comply with the request of the Indians; that even if he were able to attempt to do so, that it would require a river water supply more than ten times the present supply to make even a small increase in the elevation of the water surface of Pyramid Lake.

Records of the amount of precipitation and water supply indicate that we have, for some years past, been passing through the drought period of the cycle of water supply. Since the present season's supply has been more deficient than that of any known past year, it is possible that the water supply for the next succeeding few years may be abundant and that a raise in the elevation of the surface of Pyramid Lake will automatically take place.

Very truly yours,

/s/ Harry C. Dukes,
HARRY C. DUKES,
Water Master.

PLAINTIFF'S EXHIBIT U-239

Admitted Nov. 24, 1975

IRRIGATION
XXXXX

Schurz, Nevada
December 15, 1931

Mr. L.M. Holt
Supervising Engineer
Atlas Building
Salt Lake City, Utah.

Dear Mr. Holt:

Please refer to your letter of November 30, 1931, addressed to myself and Dr. Thomas P. Snoddy which pertains to a complaint of the Indians of Pyramid Lake Reservation that Pyramid Lake is being dried up unnecessarily.

Pending receipt of more accurate data it is not possible at this time to make a detailed report on this feature. However, a brief explanation may be sufficient.

Department of Interior, Bureau of Reclamation have a map and graph, number 7593-14, dated September, 1922 and made at Fallon, Nevada which shows the various elevations of this lake from the year 1865 to the year 1926. Since then we have obtained one other measurement—October 28, 1931—when the level was at elevation 3836.3. An inspection of this map shows that Pyramid Lake is subject to many fluctuations and is probably due to weather conditions. Since 1892 there has been a very pronounced decline with a still more abrupt drop since the year 1922. These phenomena are probably caused principally by the increased use of water for irrigation along the Truckee river in general, although, the last period mentioned was no doubt partly due to sub-normal precipitation on the watershed.

The complaint of the Indians infers that the diversion of the winter flow thru the Truckee Canal—owned by the Truckee Carson Irrigation District—is the chief cause of the recession of Pyramid Lake. This use of the water has its effect no doubt, but the use for irrigation all along the river is equally as destructive to the fishing industry. The truth of the matter is, that the use of water for both irrigation and fishing is incompatible.

As to the right of the Truckee-Carson Irrigation District to divert water thru the Truckee Canal refer to the printed decree entitled "Recommended Temporary Restraining Order "U.S. vs Orr Water Ditch Company, et al.," commonly called the Truckee River Decree. On pages numbered 9 and 10 will be found claims numbered 3 and 4 which indicate the extent of the Districts right to divert Truckee River water, store water in Lake Tahoe, etc. About 85 percent of the winter flow of the Truckee is from stored water from Lake Tahoe and normally calls for a release of about 350 second-feet thru the Tahoe gates. Legally, there is little doubt of the right of the District to divert these waters. Economically, the same is probably true as the farm returns made possible by these waters is in excess of the value of the combined fishing operations. But, the Indians have rights to sufficient water to maintain their fishing industry by virtue of their long use and dependence for food. This use undoubtedly antedates any use made by whites of the Truckee River by many, many years and should be protected. It is very doubtful, however, if non diversion of the "major portion of the winter flow" would be of any great benefit except to provide water in the river at a time when the fish are starting on their annual spawn, making it a simple matter for the Indians to snag them. Generally, there is ample water in the river during a normal year for this purpose and is probably the chief reason for the decline of fishing on this reservation; the Indians for many years have taken unlimited number during the spawning season with the result that very few

fish ever ascended the river far enough to be able to spawn. Obviously, it is very questionable whether their own interests would demand water being furnished at such a time.

I have advocated a plan for some years that I have always thought would assist in maintaining the level of Pyramid Lake. It would probably be as effective as that of permitting the winter flow to run unmolested into the lake. That is, to dam off what is called Mud Lake Slough at a point near its head on the Truckee River. (This channel furnishes Winnemmucca Lake with water from the Truckee River during flood periods.) The expense of this work would not exceed $500.00 and would result in no water finding its way to Winnemucca Lake, thereby, furnishing an increased amount for Pyramid Lake and help to maintain a higher level. It would, however, result in drying up Winnemucca Lake, but this lake is of minor importance. With this structure in it is my opinion that Pyramid Lake would recede but very slowly during normal years, although, it is only a question of time when the salinity of the lake will become to high to sustain fish life as Pyramid Lake has no outlet.

For the reasons given above and as a method of providing Indians with employment, I would urgently recommend that the dam be built in Mud Lake Slough.

Yours very truly,

E.H. KRONQUIST
General Foreman

PLAINTIFF'S EXHIBIT U-269

Admitted Nov. 24, 1975

July 9, 1934

Hon. John Collier
Commissioner of Indian Affairs
Washington, D.C.

Dear Mr. Collier:

The Indians of Pyramid Lake Reservation are hoping that they can get an investigation of their water rights, so they might know the amount due them and whether or not they receive that amount.

They are supposed to have the first right on Truckee River since the year 1859, when at that time 58.7 second ft. of water was given them for their use at Pyramid Lake Reservation. They now believe that they do not get this amount, and that the Italian squatters, above the Reservation proper, are using water that should be allowed to come down the river for Indian use. The Italian squatters are located within the Reservation, and as we understand it, they have not made any payment on Indian land and have asked for an extension of time on payments that are now past due.

We sincerly hope that you can give us help in this matter, as every year makes it more difficult for us. Our lake is fast drying up and we feel that if we could at all times get the amount of water due us, we would have a small stream going into the lake the year around.

In case of up-stream storage being put through we shall be doomed unless we can get our water rights respected by all. At this time we have here an engineer by the name of Mr. Hall who is "surveying the boundaries" of the Reservation. We thought that he could look into this matter before going away. We are sure that

for us the sooner the better, since water is very short throughout our state.

Thanking you for your good advice, we remain

Your obedient Indians of the
Pyramid Lake Agency,

/s/ Teddy James
Secretary, Pyramid Lake
Indian Council

PLAINTIFF'S EXHIBIT U-270

Admitted Nov. 24, 1975

Nixon, Nevada
July 26, 1934

Hon. John Collier
Commissioner of Indian Affairs
Washington, D.C.

Dear Sir:

On July 9th we addressed you a letter on the critical shortage of water at the Pyramid Lake Indian Reservation. Since then we have pursued our investigation further and find the following significant facts which should be submitted for your consideration:

1. At the Derby Dam on Truckee River where, by treaty of 1859, we were allotted *first* rights to 58.7 cu. ft. per sec. of water, we are now being delivered only 20 feet. Our farm agent, Mr. Brigance has had the water master on the reservation attempting to adjust the matter and is going tomorrow to Reno for another conference with the Nevada Water Master. Acting Superintendent Boczkiewicz of Steward will also be there. But this matter has been tied up in courts for some fifteen years, as we recall it, and we think that the hands of our officials here ought to be strengthened by your direct help from Washington.

2. We find that the ten Italian squatters (Joe Gordella, Alfred Cearsola & Bros., Will Cearsola, Mark Dapoli, Pierson Ranch leased by L. Evans, Mrs. Albee, Tom Blundell, Joe Garavanta, Frank Garvanta, John Monte, the last named not even having land on the reservation but who for decades has used reservation water,) on the upper edge of the reservation have built *ten dams* across the river. They divert not only an excess of water for

irrigation but even run water that they do not use into sloughs and pastures.

The result is that of the 20 feet sent down to us from the Derby Dam, only 8.33 feet gets here and much of that comes from springs or seep water rather than down through the river. This 8.33 feet is now being distributed to the nearly 600 Indians on the reservation.

We have only two officials on this reservation who can help in this matter—the ditch rider, whose time is consumed by distributing and allotting water; and the farm agent, whose time is taken up by the many duties of roadbuilding, supervising farming, stock raising, and the like. Neither of them can guard these ten dams day and night, nor can we do this. Yet there is no other way to protect ourselves from this diversion of our lawful water.

We therefore wish that you would send an official or a committee here to investigate the possibility of controlling in some way the use of our water by these squatters—or better yet of *rebuying this land* from them and in that way protecting us permanently from inavoidable water loss.

Our average farm is now only 7½ acres. Yet we have ample land all around us which we could put into cultivation if we had the water, but we have now barely enough to supply our 7½ acre farms in normal times, with hardly half enough for them this year.

We trust that we may have an early answer to our petition.

Respectfully yours,

THE PYRAMID LAKE INDIAN COUNCIL

EXHIBIT NO. B-291

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

Washington

Office of the Commissioner

Mr. A. L. Haight,
Attorney at Law,
Fallon, Nevada.

and

Aug. 28, 1934

Mr. George A. Campbell,
President, Sierra Pacific Power Co.,
Reno, Nevada.

Dear Sirs:

Your letters, each dated August 23, have been received in regard to the proposed Truckee River agreement, Newlands project.

So far as the Bureau of Reclamation is concerned, I am willing to recommend to the Department that the form of the Truckee River agreement, as enclosed with Mr. Haight's letter, be approved if it is amended so that (1) the Truckee-Carson Irrigation District will agree that the contract of 1926 between the United States and the District is to be modified so far as it is inconsistent with the Truckee River agreement, and (2) the Sierra Pacific Power Company will agree (a) that the provisions of the 1915 decree are to be modified to conform to the Truckee River agreement, (b) that the Truckee-Carson Irrigation District, so long as it remains in control of the Newlands project, is to be the proper agency to operate the Tahoe gates and control works, and (c) that the United States is "hereby" released of all re-

sponsibility for and claims on account of such operation of said gates and control works by the Irrigation District.

A proper protection of the interests of the United States requires that the Bureau insist upon these provisions. Please advise me if they are acceptable to the Truckee-Carson Irrigation District and the Sierra Pacific Power Company. My engineering and legal advisers are agreed that these changes must be made before the contract is executed by the United States.

This letter, of course, does not deal with the contract from the standpoint of the Indian Bureau, which is interested because the Pyramid Lake Indian Reservation receives its water supply from the Truckee River. I am sending to the Indian Bureau a copy of your letters and of the form of contract that accompanied Mr. Haight's letter, and asking the Commissioner to communicate his wishes to you direct.

Very truly yours,

/s/ Edward Mead
Commissioner.

Copy to Indian Bureau

EXHIBIT NO. A-464

Irrigation
35104-34

59342-17
E G S

Sep. 24, 1934

Mr. Teddy James,
Secretary, Pyramid Lake Indian Council
Nixon, Nevada

My dear Mr. James:

Receipt is acknowledged of your recent letters urging that some steps be taken looking to the protection of the Indians' right to the use of the waters of the Truckee River.

We are referring a copy of your letter to Supervising Engineer L. M. Holt, Salt Lake City, Utah, and your Superintendent with the request that this matter be considered and reported upon as soon as practicable. At the present time as you no doubt have been informed, steps are being taken looking to having the temporary order of the court entered in 1926 in the suit entitled United States of America v. Orr Water Ditch Company et al, made final by further action of the court. The Attorney General has been recently advised as to your particular interests in this matter with special attention having been given to the adequacy of the per acre duty of water for your lands fixed in the 1926 temporary order at the figure of 3.83 acre feet of water per acre and the procedure followed by the water master in distributing the water under the court's order. It has been recommended that the per acre duty of water for the Indian lands be substantially increased and that steps be taken to see that in the future a more equitable distribution of the water be placed in effect.

The problem presented by the illegal diversions of the non-Indian squatters immediately above the reservation boundaries is quite serious, and we are requesting report from the Superintendent to advise as to the results of the recent conferences held at Reno with the water master for the purpose of securing an adjustment of the matter. Purchasing such rights as these squatters may have would not be practical nor the proper solution of the problem. Should it be definitely determined the squatters are diverting water adverse to the Indians' interests, the remedy would be appropriate court action and not by way of purchase. In the meantime every effort will be made to see that your rights are properly presented and protected. In the event it is deemed practicable the Superintendent will request Mr. Hall to make an investigation as you have requested, the facts disclosed thereby to be included in the Superintendent's report.

Sincerely yours,

(Signed) John Collier
Commissioner.

7 MK 31
(8 ELM 7)
(9 ELM 11)

Copy to Supervising Engineer Holt, for report
" " Supt. Carson School " "
" " Geraint Humpherys.

I-35104-34.

EXHIBIT NO. B-332

Address All Communications To
The Commissioner

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

Washington

Dated 3-22-35

Mr. Thos. R. King,
Engineer-Manager,
Washoe County Water Conservation District,
Reno, Nevada.

My dear Mr. King:

I have received your letter of March 6, relative to the proposed Truckee River Agreement, Newlands reclamation project. Near the middle of the second page of your letter you state that on December 17 last a copy of Article XI was corrected to the form agreed upon by the Indian Office, was initialed by Messrs. Roddis and Wathen, and left with this office. We are unable to locate this in the files, and no one here remembers receiving the draft of Article XI as stated in your letter.

If changes are desired in the part of the proposed agreement relating to the Pyramid Lake Indian Reservation water rights, it is believed that you should negotiate in regard to this direct with the Indian Bureau.

The Acting Secretary in his letter to me of February 14 did not give his reasons for suggesting that the last sentence of Article XIV be omitted from the proposed agreement. A copy of your letter and this letter is being furnished to the Department, to the Indian

Bureau, to the Sierra Pacific Power Company, and the Truckee-Carson Irrigation District.

Very truly yours,

/s/ Elwood Mead
Commissioner.

Copy to Office of Secretary
(With copies of correspondence.)

EXHIBIT NO. A-506

Admitted Mar. 31, 1976

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

FIELD SERVICE

Carson Indian Agency
Stewart, Nevada
July 2, 1935

Commissioner of Indian Affairs
Washington, D. C.

Subject: *Preliminary Study of Pyramid Lake Trout Problem.*

My dear Mr. Collier:

As you know from our previous correspondence, Mr. Foster, Regional Director for the United States Bureau of Fisheries, sent in M. J. Madsen and an assistant (William F. Carbine) to make a preliminary study of the trout problems at Pyramid Lake. I am now sending you a copy of the report which Mr. Madsen has prepared together with the forwarding letter from Dr. Hazzard. We were very grateful indeed for this cooperation and hope that much of value may be derived from the study and the further action that may be taken.

I would like at this time to act upon Dr. Hazzard's suggestion that we take steps to obtain a more detailed biological study of Pyramid Lake conditions in relation to trout or other fish life. I would like to respectfully request that you place a request for the conducting of such a study with the Commissioner of Fisheries as soon as possible. You will note that Dr. Hazzard believes that they might be able to make such a detailed survey if or when funds become available.

We would like to refer briefly to the recommendations. As you know, we have repeatedly directed attention to the tragic situation which results from the drying up of the Truckee River through diversion of practically all of its water for irrigation purposes. You have assured us and our own understanding of the situation persuades us against our will that it will be practically impossible at this late date to obtain any assured flow of water from the Truckee River into the lake. The time for that was when the original Truckee River water rights were being adjudicated.

I believe that we shall make genuine progress next year in the matter of regulating the sale of Indian-caught fish. It will make that very much more feasible and effective if we can obtain funds to erect a small refrigerating plant so that the Indian Council can regulate the industry by requiring all fish to be brought to the tribe's cold-storage plant and sold from there. All fish not so handled could be declared illegally sold. In that way the market would not be flooded some days and without fish on others and the price could be maintained at a fair level. We propose to submit a project for the erection of such a small refrigerating plant at some time in the near future.

We also expect to submit a request for funds to establish and operate during the initial year the egg eyeing station on Morgan Creek. We are asking the Bureau of Fisheries to send us plans and estimates on cost for such a station. We want also to investigate a little further the possible market for the eyed eggs and the possibility of making a deal with some hatcheries to rear fish for us to a 5-inch length on an exchange basis; that is, so many eyed eggs in return for so many 5-inch trout.

The Nevada State Fish and Game Commission has not yet succeeded in obtaining a state law prohibiting the sale or use of fish roe as fish bait. Until that is done it would be very difficult to get the Indians to discon-

tinue its sale. White sportsmen offer large prices for it and Indians who are almost destitute can hardly be expected to refrain from accepting these prices. The egg eyeing station, which Mr. Madsen assured us would make it possible to realize a considerably larger sum on fish spawn, may in itself cut down the sale of spawn for fish bait.

In a few days I shall forward to you a summarized report on the fishing activities as reported by our Indian fish wardens on the reservation for the months of March, April, and May. That will contain some very interesting material and material that will be most useful in planning for next year's regulations.

Sincerely yours,

/s/ Alida C. Bowler
ALIDA C. BOWLER
Superintendent

ACB/gcp

cc: Pyramid Lake Indian Council
State Fish & Game Commission
Reno Sportsmen's Protective Association
Washoe County Commissioners

PLAINTIFF'S EXHIBIT U-333

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

Irrigation Service
647 Phelan Building
San Francisco, California

September 24, 1942

Mr. R. S. Calland
District Engineer
Bureau of Reclamation
Sacramento, California

Dear Mr. Calland:

This has reference to your letter of September 5 regarding flows required in Truckee River for fish migration upstream from Pyramid Lake, Nevada.

The Indian Irrigation Service in its construction of the Truckee River Control Project near the mouth of the river has recently completed a canal to provide means of travel for fish from Pyramid Lake to the upstream spawning beds. We had expected to complete the entire project this year but work has been slowed down considerably by war conditions. Funds are available for continuing work whenever it can be accomplished without interfering with the war effort.

The fish canal was constructed to carry 340 c.f.s. Those familiar with the habits of the cut throat trout and cui-ui in the lake estimate that a flow of 250 to 300 c.f.s. is required to make travel from the lake attractive and safe for these fish. We do not know definitely how long this flow should be maintained. By actual count at the fish ladder of our diversion dam on the reservation we know that the run upstream has been sustained for a period of two weeks during the spawning

season. Such a count was made from February 21 to March 6 in 1924. I presume that 10 days to 2 weeks would be a minimum period, and longer would be preferable. In many years the flow in the lake greatly exceeds this amount for sustained periods.

We feel that the Pyramid Lake Indians have a strong claim to sufficient water to maintain their fishery. When the reservation was set aside for them in 1859 it was contemplated that they would gain their livelihood by fishing, and by production of food on their agricultural lands. Their right to the use of water for agriculture has not been questioned. They enjoy the first right on the Truckee River for irrigation. But these Indians, until recently, have always derived a substantial part of their income from their fishery. The cash income has amounted to as much as $10,000 a year in addition to the value of fish consumed as an important part of their diet. This income has been almost entirely wiped out by the loss of their fishery caused by diversions of water upstream in excess of the quantity necessary to maintain the lake level. It would appear that their right to water to maintain their food supply from fish is as valid as their right to water to produce food on the land. It was so intended when their rights to the resources of this area were restricted to the reservation set aside for them.

Yours very truly,

(Signed)
E. C. FORTIER,
District Engineer.

cc Acting Director of Irrigation Southworth
Superintendent Foster
District Counsel Humphreys

PLAINTIFF'S EXHIBIT U-334

Admitted Nov. 24, 1975

DEPARTMENT OF JUSTICE

P/O Box 2229,
Reno, Nevada.
AIRMAIL May 15, 1944.

REM-WHW
182979

The Attorney General
Lands Division
Trial Section
Washington, 25, D. C.

Re: United States v. Orr Water Ditch Co. et als—U. S. District Court—Nevada—Motion for Entry of Final Decree pursuant to Stipulation—Reservation of Power Company.

Sir:

Please refer to the reservation made by the Sierra Pacific Power Company in the Stipulation for Entry of Final Decree in the above cause, which appears on page 9 thereof, and reads as follows:

> "The provisions of this proposed decree relating to the question of ownership of water diverted for irrigation under the Highland Ditch have not been agreed to by the Sierra Pacific Power Company and are reserved for determination by the Court prior entry of final decree, but the priorities and the rights to the use of water as mentioned in said claims Nos. 99 to 141, inclusive, shall not be contested by said Power Company."

It is apparent at the present time that Wm. M. Kearney will vigorously oppose the Power Company's

desire to prevail upon the Court in its entry of final decree to award the ownership of water diverted for irrigation purposes through the Highland Ditch to the Company, as distinguished from the present form of decree which apparently awards those rights to the water users for irrigation. In this respect, please refer to the Special Master's Explanatory Remarks appearing on pages 91-93 thereof, two copies of which are enclosed herewith for your ready convenience and files. Also refer to the cases of *Prosole* v. *Steamboat Canal Company*, 37 Nev. 155, and *Reno Light & Power Company* v. *Public Service Commission*, 300 Fed. 645.

The Washoe County Water Conservation District, through its attorney, Mr. Merrill, has stated that it is not in anywise interested in the question reserved by the Power Company, in that it deals entirely with individual rights for diversion and natural flow. The same thought is expressed by Mr. Haight, as attorney for the Truckee-Carson Irrigation District. It is my present belief that the United States also is not interested in that question reserved by the Power Company. Two copies of the reservation by the Power Company are enclosed herewith for ready reference.

In this connection, please refer to Claims Nos. 101 to 141 inclusive, wherein it will appear that in all but Claim No. 130, my old firm of Cooke, French & Stoddard appeared as attorneys for the individual water users served for irrigation purposes through said Highland Ditch. I handled this particular matter as a member of the firm. I prepared petitions for intervention of these individual users (who are not named as defendants in the Amended Complaint), which petitions were allowed, whereupon I filed Answers on their behalf and presented proof as to their individual claims as to priorities, irrigated areas and duty of water before the Special Master, Judge Talbot, proceeding in that respect upon the theory that the individual water users were

the owners of the right to divert, and in any event, believing that their respective priorities, areas and duty of water should be established in the decree, notwithstanding the question of the legal ownership of the right to divert.

In addition, my old firm of Gibbons, French & Stoddard appeared for John P. Williams (Claims Nos. 628-629), and also my brother, R. C. Stoddard, now deceased, and myself appeared for our neighbors who purchased land and water rights from C. H. Stoddard, my father, now deceased. In all these matters, however, no exceptions were taken or filed to the findings and proposed decree of the Special Master, nor was any appearance made on their behalf except by introducing evidence as to their respective priorities, areas and duty of water.

After July 1, 1919 when my firm became attorneys for the Truckee-Carson Irrigation District at Fallon, Mr. Wm. M. Kearney was, at the request of the individual users, substituted as attorney for the irrigation water users of the Highland Ditch. My last act as one of the attorneys acting on behalf of said users in the matter, was to file a brief with the Special Master in support of the ownership of the right to divert vesting in the individual users and not the Power Company. The Special Master filed the brief with the Clerk of the Court on July 1, 1925. Mr. Kearney prepared and filed numerous exceptions to the Special Master's Findings and proposed decree, etc., which he argued before Federal Judge Farrington, now deceased, as appears in the minutes of the Court, on July 11, 1925. I did not participate further in the matter after the Special Master filed his findings and proposed decree, etc. The only further appearance I made before Judge Farrington was after entry of Temporary Restraining Order on February 13, 1926, when I appeared on behalf of the Truckee-Carson Irrigation District in connection with

assessments to be made for payment of Watermaster's costs.

The purpose of presenting the above brief resume of facts to the Department is that I may have the benefit of the Department's thoughts in the matter as to whether or not I am disqualified to appear as a Special Assistant to the Attorney General in the presentation of the motion for entry of final decree. It should be noted that a number (but not all) of the water users of the Highland Ditch have stipulated to the entry of the final decree now being sought, pursuant to the Stipulation and the terms of the Truckee River Agreement.

For the information of the Department, I have heretofore discussed the matter of qualifications of myself and the presiding Judge, Frank H. Norcross, in this motion for entry of final decree, with Mr. Orrick, Mr. Merrill, Mr. Haight and Mr. Thatcher, who were unanimously of the opinion that I was not, in view of the factual situation, disqualified. I agree with them, assuming that the question of ownership of the right to divert irrigation water into the Highland Ditch is of no interest to the Government. I have not acquired any information from former clients that does not appear in the record. There is no intention on the part of any of the attorneys for the major signatory parties to the Agreement and Stipulation to disqualify Judge Norcross, though he appears, as will be noted in Claims Nos. 16 and 474, as attorney for certain defendants. In connection with my own qualifications, it is important, of course, to know whether or not the Government is a disinterested bystander in the controversy that is going to be brought forth at the hearing of the motion for entry of final decree as to the reservation made by the Power Company in the Stipulation.

It is my belief that whether I am disqualified or not, either Mr. Mulroney, Chief of the Trial Section, or Mr. Walter H. Williams, should arrange to be present at

the hearing, if at all convenient, and preferably arrive several days in advance thereof.

Will you please give me the benefit of your advice in the premises.

Respectfully,

/s/ Roy W. Stoddard
ROY W. STODDARD,

Special Assistant to the Attorney General.

RWS:JP
Enc.

Pages 91-93—SPECIAL MASTER'S GENERAL EXPLANATORY REPORT:

DITCH COMPANY AS CONVEYOR.
IRRIGATION RIGHT IN USER
RIGHTS OF CONVEYOR AND USER.

On behalf of the Steamboat Canal Company, the Orr Ditch and Water Company, and the company owning the Highland Ditch, and other companies charging for the delivery of water, it is claimed that the right to the water should be allowed to the companies and not to the users of the water. In fact on behalf of the Government the case was presented on this theory.

In this state, the basis for the right is the beneficial use which has been made by the appropriator or rancher. Statutes and decisions in other states holding that the right belongs, and should be allowed to the company conveying and distributing the water, are of no force here.

The opinions of the federal and state courts, including the Supreme Court of the United States, hold that if there is a conflict the construction of an act of Congress such as the one of 1866 by the federal courts is binding upon state tribunals the same as the construction of a state statute by the Supreme Court of the state is binding upon all federal courts. As Congress by this act has delegated the control of the use of water to the states, the decision of the state Supreme Court in the case of the Presole against the Steamboat Canal Company. to the effect that the one who applies to the irrigation of land, water delivered to him by a ditch company, is the owner of the appropriation right, and that the ditch company or owner of the ditch delivering the water is a conveyor entitled to reasonable payment for conveying and delivering the water, is conclusive in all courts, state and federal, not only against the Steamboat Canal

Company, but in all such cases pertaining to water rights in this state. It is useless to go far afield, to pursue strange gods, or to consider the law, statutory or judicial, prevailing in this regard in other states. The local solicitor for the government and counsel for ditch companies who have claimed that the appropriation rights do not belong to the persons who applied the water to the land may have been led astray by statutes or practices prevailing or decisions in other states.

Water from the Truckee River is delivered under a variety of conditions. Some companies have no appropriation right for the use of the water, and deliver for merely a fixed charge; other companies deliver to stockholders without any charge, excepting assessments sufficient to cover the maintenance and operation of the ditch; some obtain it at lower rate by reason of a prior contract; some individuals owning ditches deliver water only to their own lands, while others charge for the delivery of part of it along the ditches. As provided by the recommended decree the conditions on which water is to be delivered by ditch companies or conveyors of water to the users, are not determined in this action. The companies or individuals diverting and conveying the waters are entitled to divert enough to deliver to the users, after transportation loss, the amount allowed them for application to the land."

Page 9—FINAL DECREE:

> "The provisions of this proposed decree relating to the question of ownership of water diverted for irrigation under the High Land Ditch have not been agreed to by the Sierra Pacific Power Company and are reserved for determination by the Court prior to entry of final decree, but the priorities and the rights to the use of water as mentioned in said claims Nos. 99 to 141, inclusive, shall not be contested by said Power Company."

PLAINTIFF'S EXHIBIT U-335

Admitted Nov. 24, 1975

REM-WHW
182979

KTC

May 25, 1944

Mr. Roy W. Stoddard
Special Assistant to the Attorney General
Post Office Box 2229
Reno, Nevada

Dear Mr. Stoddard:

Re: *United States v. Orr Water Ditch Company*

Your recent letters have not been answered sooner because of the necessity of finding information in the voluminous files on the case before responding to your questions.

Letter of May 4, 1944. You state that the attorneys for the major parties to the Truckee River Agreement propose to object to the introduction of any evidence of conditions subsequent to the entry of the temporary restraining order on February 13, 1926, for the purpose of showing better or different water rights such as a change in priorities, area, or duty of water. Also it is proposed to object to testimony offered to establish different or better water rights than those decreed in the temporary restraining order because of alleged error that does not appear on the face of the temporary restraining order. You point out the inconsistency between the proposed objections and the fact that in the stipulated form of final decree the parties to the Truckee River Agreement have deleted a number of rights that appear in the temporary rstraining order and are owned by defendants (also the State of Nevada) who are not parties to the Truckee River Agreement.

If the owners of the deleted rights make no objection perhaps it could well be argued that the parties whose rights are the same in the final decree as in the temporary restraining order can not use the deletions as a basis for bettering their rights. But to insist on the deletions and at the same time to make the proposed objections would be entirely inconsistent in theory, and it seems that adoption of that course of action would only increase the obstacles to obtaining the entry of the final decree. Even if such an inconsistent position could be successfully maintained, nothing of practical importance would be gained since, as you say, the deleted rights have been abandoned and use cannot be made of those rights in the same manner as formerly. Before those rights can be reinstated in fact, as distinguished from a recognition in the final decree, there would be ample opportunity to raise the question of abandonment either before the court or the State Engineer.

Letter of May 8, 1944 to you, from J. R. Alexander, District Counsel, enclosed with your letter of May 10, 1944. Mr. Alexander raises the question whether the parties to the stipulation will be taking an inconsistent position if they ask for reinstatement of the claims mentioned above. The first answer to this question is the fact that reinstatement of the claims is more a matter of form than a matter of practical significance. But the more important point seems to be that however difficult it was to get the Truckee River Agreement signed, the provisions of that agreement and the stipulated form of final decree cannot prevent parties whose claims are omitted from having them reinstated as of 1926; or, if the court should refuse to reinstate them on the ground that they have been abandoned since 1926, the way would certainly be open for other claimants to establish that their rights are now different than in 1926.

Letter of May 11, 1944. It is noted that the motion for entry of final decree is set for September 6, 1944

and that objections to the stipulated form of final decree must be filed by July 11, 1944.

Letter of May 15, 1944. The Department does not consider that you are disqualified to present the motion for entry of final decree in behalf of the Government. It is noted that you represented several water users under the Highland Ditch and filed a brief supporting their claim that rights in water should be decreed to them rather than to the owner of the Highland Ditch. It appears that counsel for the Government argued before the Special Master that rights in water should be decreed to the owners of canals rather than to the water users under the canals. Presumably that argument was made because it was consistent with the claim of the United States to ownership of the waters of the Indian lands and the reclamation project. (Apparently the Government took this position in oral argument since the point is not covered in the two briefs filed by the United States.) There is nothing in the Department's file to indicate that at this time the United States should either support or oppose the Sierra Pacific Power Company in its claim of ownership of the waters decreed to the lands under the Highland Ditch. As stated in the stipulation for entry of final decree, the determination of the power company's claim will not affect the amount of water diverted by the Highland Ditch or the use of the water from the ditch. Moreover, it is no longer necessary for the Government to support the company's claim as a matter of consistency with its own claims since the United States rather than the users on the Indian and project lands was decreed to be the owner of the waters used on those lands; and it does not appear that anyone has or will challenge the form of final decree in that respect.

Since the hearing on the motion for entry of final decree will not be heard September, it will be decided later whether Mr. Mahoney, Mr. Walter Wil-

liams, or some other representative of the Department will be present at the hearing.

Letter of May 16, 1944. The discussion of your letter of May 4 is applicable to the question of whether claims Nos. 13 and 14 of the Wadsworth Light and Power Company should be reinstated. As to claim No. 15, however, the situation is different and it is believed that this claim was quite properly deleted from the form of final decree. Your interpretation of the last paragraph of claim No. 15 is considered correct. But even if the word "decree" in that paragraph could be construed to mean the final decree rather than the temporary restraining order, it is clear that the claim should not be reinstated.

The claim was dismissed in 1926. An action under the Tucker Act must be brought within six years after the claim has accrued, and if it is assumed that the filing of the counter-claim tolled the statute it is obvious that the claim was barred in 1932. Additional reasons for deletion of the claim are that no suit under the Tucker Act has been instituted since that Act authorizes only original suits and not counterclaims, *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C.C.A. 2, 1913), and in any event the district court does not have jurisdiction of claims over $10,000. *Otis Elevator Co.* v. *United States*, 18 F. Supp. 87 (S.D. N.Y., 1937). It may also be noted that claim No. 15 appears to be based on a tort rather than on a contract implied in fact. It does not seem necessary to raise this point, however, in view of the conclusive character of the other reasons for deleting the claim.

Letter of May 17, 1944. In this letter you discuss the problems resulting from the differences between the rights awarded Indian lands in the form of final decree and in the temporary restraining order. It is noted that Mr. Harding's testimony does not support the lower duty of water for the bottom lands in claim No. 1 and that

there is no testimony concerning the duty of water for the bench lands. The form of final decree also increases the area of land awarded water rights. It is hoped that none of the parties who did not agree to the form of final decree will raise an objection to the increases for the Indian lands. If they do and the Government tries to support the increases by the introduction of evidence, there seems to be no reason why other parties should not be allowed to offer evidence regarding their claims. You suggest that it may be advisable to have a qualified engineer prepared to offer testimony as to the duty of water for the bottom lands (would it not be necessary to have testimony relating to the bench lands too?). Since all objections to the form of final decree must be filed by July 11 and you doubt whether any objections will be made to claims Nos. 1 and 2, it does not seem necessary to request the Department of the Interior to furnish an engineer until after it is known whether additional testimony will be needed or desirable. If objections are filed, the form of the objections might determine the type of testimony that should be offered. Please inform the Department whether you agree that this matter can be safely deferred until after the objections are filed.

Respectfully,
For the Attorney General

J. EDWARD WILLIAMS
Acting Head, Lands Division

EXHIBIT NO. G-32

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 87-B

PYRAMID LAKE PAIUTE TRIBE OF THE PYRAMID LAKE RESERVATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: July 23, 1975

FINDINGS OF FACT ON COMPROMISE SETTLEMENT

This matter is now before the Commission for approval of a compromise settlement and the entry of a final judgment, in the amount of $8,000,000, in favor of the Pyramid Lake Paiute Tribe, on its claim for damages suffered as the result of its not having received all of the water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation. The said "water" claim, which was previously presented in Docket No. 87-A, was separated from all other claims in Docket 87-A and assigned to Docket No. 87-B by order of the Commission entered of even date herewith.

During the course of the proceedings in Docket No. 87-A, two interlocutory decisions were issued by the Commission pertinent to the Pyramid Lake Indian Reservation and the water claim. The first was a decision entered February 16, 1972 (27 Ind. Cl. Comm. 39), and the second was entered April 25, 1973 (30 Ind. Cl. Comm. 210).

Agreement was subsequently reached by the Pyramid Lake Paiute Tribe and the United States on a compromise settlement of the water claim. A hearing having been held before the Commission on July 14, 1975, on the proposed compromise settlement, the Commission makes the following findings of fact:

1. Counsel for the plaintiffs herein submitted to the Department of Justice letters dated January 24 and 31, 1975, relative to a proposed compromise settlement of the Pyramid Lake water claim for a net final judgment of $8,000,000 in favor of the Pyramid Lake Paiute Tribe, with no review to be sought or appeal taken by either party. The letter of January 31 was accompanied by a draft of a stipulation for entry of final judgment on the water claim. The settlement proposal was conditioned upon the approval of the compromise by the governing body and members of the Pyramid Lake Paiute Tribe and the approval by the Secretary of the Interior or his authorized representative of the compromise settlement and of the tribal resolutions approving the settlement.

2. By letter of March 26, 1975, to counsel for plaintiffs, Assistant Attorney General Wallace H. Johnson transmitted a revised draft stipulation and advised as to the agreement of the Department of Justice to the settlement of the water claim relative to the Pyramid Lake Indian Reservation by a payment by the United States in the amount of $8,000,000, subject to the following additional conditions:

> 1. That you accept the enclosed revised draft stipulation.
>
> 2. That, in connection with entering final judgment pursuant to the settlement, the Commission shall enter a finding that the *Winters* doctrine water rights or any other water rights on which the claim for damages for deprivation of water herein are based are the exclusive property of the Pyramid

Lake Paiute Tribe of Indians, in which no other tribe or group of Indians, has any right, title or interest.

3. That, while the parties are of the opinion that no water rights reserved to the Pyramid Lake Paiute Tribe have been taken, lost, diminished or subordinated by anything that has happened or been done since the creation of the Pyramid Lake Indian Reservation, the judgment by the Commission pursuant to the settlement shall finally dispose of and bar, up to the date of execution of the stipulation for entry of final judgment, any and all claims that were or might have been asserted in Docket No. 87-A for damages or compensation for loss of water or damage to fisheries and any and all claims for damages or compensation for the loss, taking, subordination or diminution, by acts or omissions of the United States accruing before the date of execution of the stipulation, of water rights that were or may have been reserved in connection with the establishment of the Pyramid Lake Indian Reservation,

4. That, coincident with the filing of the stipulation for entry of final judgment, the plaintiffs shall file with the Commission, and, coincident with the entry of final judgment on the settlement, the Commission shall accept, an amended and supplemental petition in Docket No. 87-A in which plaintiffs shall restate and set forth the remaining claims in Docket No. 87-A, which claims shall expressly exclude any claim for damages or compensation based upon acts or omissions of the United States prior to the date of execution of such stipulation that allegedly resulted in the loss of fish or fisheries, water or water rights reserved to or owned by the Pyramid Lake Indian Reservation.

3. Counsel for the parties signed the stipulation for settlement in final form on March 26, 1975, as follows:

STIPULATION FOR ENTRY OF FINAL JUDGMENT

It is hereby stipulated, agreed and understood by and between the parties, through their attorneys, as follows:

1. One of the claims presented in this case on behalf of the Pyramid Lake Paiute Tribe is for damages suffered as the result of its not having received, since 1859 to the present time, all of the water to which it was entitled under rights reserved for it at the time of establishment in 1859 of the Pyramid Lake Indian Reservation.

2. On behalf of the Pyramid Lake Paiute Tribe, the United States, among other things, is now prosecuting a suit in the United States District Court for the District of Nevada, against the Truckee-Carson Irrigation District and others, to vindicate and confirm such rights.

3. Both the Pyramid Lake Paiute Tribe and the United States are convinced that, as of the date of the establishment of the Pyramid Lake Indian Reservation in 1859, there was reserved for the benefit of the Pyramid Lake Paiute Tribe the rights to sufficient water from the Truckee River for the maintenance of Pyramid Lake, for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish, and for other needs of the reservation, such as irrigation and domestic use. Both are convinced that such rights have not been diminished or lost by anything that has happened or been done from the time of establishment of the reservation to the present.

4. The Pyramid Lake Paiute Tribe sued here solely for damages suffered by reason of not having received all of the water to which [it] was entitled

under such rights, which it contends were reserved for its benefit in 1859, and are reserved for its benefit today. Specifically, the Pyramid Lake Paiute Tribe did not sue here for damages or compensation for the loss, diminution or taking of any such reserved water rights, but only for damages sustained by reason of not having received all of the water to which it was and is entitled under such rights, and no part of the award of damages to be entered pursuant to this stipulation represents damages or compensation for the loss, diminution or taking of any water rights.

5. The claim in this case, Docket No. 87-A, prosecuted on behalf of the Pyramid Lake Paiute Tribe for damages suffered by reason of its not having received all of the water to which it was entitled under such rights, which claim was the subject of the decision of the Commission entered on April 25, 1973 (30 Ind. Cl. Comm. 210), and which had been scheduled for trial before the Commission on January 27, 1975, shall be separated from all other claims in this case and shall be assigned to a new case, to be designated Docket No. 87-B.

6. Simultaneously, the plaintiffs, Northern Paiute Nation, et al., shall file with the Commission an amended petition in Docket No. 87-A, which shall expressly set forth all claims remaining in this docket. Any claim not expressly set forth in the amended petition shall be forever barred by this settlement. Such amended petition shall be accepted by the Indian Claims Commission as setting forth all remaining claims in Docket No. 87-A, which claims shall expressly exclude any claims for damages or compensation based upon acts of [sic] omissions of the United States prior to the date of execution of such stipulation that allegedly resulted in the loss of fish or fisheries, water or water rights reserved to the Pyramid Lake Indian Reservation.

7. All claims which were or could have been set forth in Docket No. 87-A, except as specifically reserved in the amended petition referred to in paragraph 6, above, shall be compromised and settled by the entry of final judgment by the Indian Claims Commission in Docket No. 87-B in the amount of $8,000,000 in favor of the Pyramid Lake Paiute Tribe. No review shall be sought of or appeal taken from such final judgment, and the United States shall waive any and all claims or demands for offsets or gratuities against the Pyramid Lake Paiute Tribe to date of execution of this stipulation.

8. The Pyramid Lake Paiute Tribe shall accept such award of $8,000,000 in full satisfaction and settlement of all damages sustained by it to date of execution hereof by reason of its having been deprived of water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation.

9. Although, as stated, both the Pyramid Lake Paiute Tribe and the United States are of the view that no water rights reserved for the Pyramid Lake Indian Reservation have been lost, diminished or taken by reason of anything that has happened or been done between 1859 and the present, and although the award of $8,000,000 to be entered pursuant to this stipulation is strictly for damages sustained by the tribe by reason of its not having received all of the water to which it was entitled under such rights, the tribe covenants, should it be finally judicially determined that, by reason of acts or omissions of the United States done or occurring prior to the date of execution hereof, water rights once reserved for the Pyramid Lake Indian Reservation were lost, taken, subordinated to other rights, or otherwise diminished, that it will not again sue the United States to recover additional damages or sue

for compensation for the loss, taking, subordination or diminution of such water rights. This covenant shall not extend to acts or omissions of the United States done or occurring after the execution of this stipulation that result in depriving the reservation of water to which it is entitled under such rights as it then shall have, or that result in losses, takings, subordinations or diminutions of such rights.

Dated this 26th day of March, 1975.

/s/ Wallace H. Johnson
WALLACE H. JOHNSON
Assistant Attorney General
Department of Justice

/s/ A. Donald Mileur
A. DONALD MILEUR
Chief, Indian Claims Section
Department of Justice

/s/ Marvin E. Schneck
MARVIN E. SCHNECK
Attorney for Defendant
Department of Justice

/s/ Abe W. Weissbrodt
WEISSBRODT & WEISSBRODT
Attorneys for the Plaintiffs
Docket No. 87-A

4. The proposed settlement was presented for the consideration and vote by the members of the Pyramid Lake Paiute Tribe at a meeting held on the Pyramid Lake Reservation, at Nixon, Nevada, on May 17, 1975. This general membership meeting was called and held pursuant to a notice which was issued by Allen Aleck, Chairman of the Pyramid Lake Paiute Tribal Council.

5. A copy of the notice of the general meeting to be held on May 17, 1975, was received in evidence as part of Exhibit S-4. The notice specified the place, date and hour of the meeting and stated that the purpose of the meeting was to consider and vote upon a proposed settlement of the water claim of the Pyramid Lake Paiute Tribe in Docket 87-A, which settlement provided for the payment by the United States to the Tribe of the sum of $8,000,000. In addition, other steps were taken to publicize the calling of the meeting, including the posting of the notice at the post office and local store on the reservation (Exhibit S-5) and publication in certain newspapers (Exhibits S-7 and S-8).

6. Also received in evidence as part of Exhibit S-4 was a certification of Carol Wadsworth, Secretary of the Pyramid Lake Paiute Tribal Council, that prior to May 1, 1975, she supervised and caused to be mailed a copy of the notice to all members of the Pyramid Lake Paiute Tribe who were of voting age, as shown on the records and membership lists of the Tribe.

7. At the general meeting votes were cast by 159 persons. The result of this vote was 158 in favor of a resolution approving the proposed settlement and 1 opposed. A copy of the minutes of the meeting and a certified copy of the resolution approving the settlement were received in evidence as Exhibit S-1. Prior to voting at the meeting, the terms of the proposed settlement were carefully explained. Copies of the exchange of letters (Exhibits S-9, S-10 and S-11) between the claims attorneys for the Tribe and the attorneys for the Department of Justice

relative to the proposed settlement, as well as copies of the Stipulation for Entry of Final Judgment executed by the attorneys were presented at the meeting. Also, copies of a written report by the Tribe's attorneys (Exhibit S-12) were distributed at the meeting. This report was also read aloud in full at the meeting. The report described the terms of the proposed settlement and set forth the recommendations of the attorneys. Those attending the meeting were afforded the opportunity to request further information and to ask questions and all requested information was supplied and all questions were answered.

8. After the adjournment of the general meeting, a meeting of the Pyramid Lake Paiute Tribal Council, the governing body of the Tribe, was held on the same day. At this meeting a resolution approving the settlement was adopted by the Tribal Council by a vote of *8* for and *0* against. Certified copies of the resolution and the minutes of the meeting were received in evidence as Exhibit S-2.

9. A representative of the Bureau of Indian Affairs was present at the general meeting and the meeting of the Tribal Council. On the basis of the report submitted by the representative of the Bureau as well as information on the merits of the proposed settlement supplied to the Bureau by the attorneys for the Indians, the Department of the Interior approved the settlement by letter dated June 20, 1975, addressed to the law firm of Weissbrodt & Weissbrodt, claims attorneys for the Tribe, as follows (Exhibit S-3):

> You requested our approval of a proposed compromise to settle the "water claim" of the Pyramid Lake Paiute Tribe, before the Indian Claims Commission in Docket No. 87-A, for a final net judgment of $8,000,000.00 in favor of the Pyramid Lake Paiute Tribe of Indians.

The subject water claim is being prosecuted under contract, Symbol 14-20-0450 No. 4883, dated June 14, 1964, between the Pyramid Lake Paiute Tribe and your law firm and Associated Attorneys Jay H. Hoag and Rodney J. Edwards. An extension of the contract until June 13, 1975, was approved on January 19, 1973.

Briefly, the claim is for damages resulting from diversion of waters of the Truckee River causing a lowering of the water in Pyramid Lake which resulted in loss of fish, impairment of fishing and related activities, and erosion of lands within the Pyramid Lake Reservation. Acceptance of the $8,000,000.00 would constitute final settlement for damages sustained by the Pyramid Lake Paiute Tribe up to the date of the signing of the stipulation, by reason of having been deprived of water to which the tribe was entitled under rights reserved under the law for the Pyramid Lake Indian Reservation. The terms of the proposed settlement are set out in the Stipulation For Entry of Final Judgment dated March 26, 1975, that was executed by the parties.

It is understood that the tribe's "water claim" that is the subject of the proposed settlement will be placed in a separate docket to be designated No. 87-B and that you will file an amended petition in No. 87-A excluding therefrom the claims settled by the proposed compromise settlement.

Your offer to settle the "water claim" for $8,000,000.00 was made by letters addressed to the Assistant Attorney General on January 24 and 31, 1975. The Assistant Attorney General accepted your offer on March 26, 1975, with conditions. Two of the conditions were that the proposed settlement, as well as the resolution of the tribe, be approved by Secretary of the Interior or his authorized representative.

You took the terms of the proposed settlement to the Indians of the Pyramid Lake Paiute Tribe on May 17, 1975. A representative of the Bureau of Indian Affairs was present and reported on the meeting.

The chairman of the Tribal Council of the Pyramid Lake Paiute Tribe certified that notices of the general meeting of members of the Pyramid Lake Paiute Tribe to be held on the Pyramid Lake Indian Reservation in the Gymnasium in Nixon, Nevada, on May 17, 1975, to consider acceptance or rejection of the proposed settlement, were mailed prior to May 1, 1975, to all members of voting age at their last known addresses. Also, copies of the notice were posted in Abe and Sue's Store in Nixon and in the Post Office in Nixon. The notice also appeared in newspapers of general circulation within the area.

At the meeting, you gave to the members a copy of a report that you had prepared explaining the claim and the terms of the settlement. This report was read aloud at the meeting. A full explanation was made orally by Claims Attorney I. S. Weissbrodt. Members of the tribe asked questions and all were answered. After the discussion period and the question and answer session ended, all persons who claimed to be eligible voting members of the tribe were given the opportunity to cast a ballot on acceptance or rejection of the proposed settlement. The balloting resulted in adoption of a resolution by a vote of *158* for and *1* against accepting the proposed settlement. Minutes of the meeting were recorded and they also reflect the conduct of the meeting and the results of the casting of ballots. The resolution and minutes were signed by the Chairman and the Secretary of the Tribal Council of the Pyramid Lake Paiute Tribe. Their signatures were certified to be genuine.

The Tribal Council of the Pyramid Lake Paiute Tribe also met on May 17, 1975, after the general meeting had ended. The Council considered the proposed settlement and accepted it by Resolution No. P.L. 25-75, adopted by a vote of *8* for and *0* against. The resolution reflected the views of the members who voted at the general meeting. The resolution was signed by the Chairman and Secretary. Their signatures were certified as genuine.

We are satisfied that the general meeting held on May 17, 1975, was well publicized and that the adult voting members had an opportunity to attend. The meeting was satisfactorily conducted with the balloting conducted after the members had the opportunity to consider the proposed compromise. The meeting of the Tribal Council of the Pyramid Lake Paiute Tribe was also satisfactorily called and conducted with Resolution No. P.L. 25-75 being duly adopted in the usual manner. Both resolutions reflect the position of the members who voted and the results reflect the views of the tribal membership. Both resolutions are hereby approved.

In light of the information which you have furnished to us, that which has been submitted by our field offices, and that obtained from other sources, we are satisfied that the proposed settlement of the "water claim" as set forth in the Stipulation For Entry of Final Judgment dated March 26, 1975, is fair and just. The proposed settlement is hereby approved.

Sincerely yours,

/s/ Morris Thompson
Commissioner of Indian Affairs

10. At the hearing before the Commission on the proposed settlement, held on July 14, 1975, Allen Aleck, Chairman of the Pyramid Lake Paiute Tribal Council and Roy Garcia, member of the Council, appeared and were sworn as witnesses. They testified concerning their understanding of the settlement, the procedure and conduct of the general meeting and the meeting of the Tribal Council and the votes taken at the meetings. This testimony established that reasonable and adequate steps were taken to give ample advance notice of the general meeting to the members of the Pyramid Lake Paiute Tribe and the members of the Tribal Council; that sufficient explanations were given and sufficient discussion took place at the meetings so as to assure that the members of the Tribe and of the Tribal Council understood the proposed settlement before they voted; and that the general meeting and the meeting of the Tribal Council were conducted properly and fairly.

At the hearing counsel for all the plaintiff tribes and groups in Docket 87-A stated that during April 1975, copies of the amended and supplemental petition filed under Docket 87-A on July 2, 1975, were distributed to all said tribes and groups. The details of the proposed settlement of the Pyramid Lake Paiute water claim and of the continuing prosecution of all other claims under Docket 87-A were explained to said tribes and groups. Counsel further stated that none have objected to these arrangements.

11. By its interlocutory decision of February 16, 1972, entered in Docket No. 87-A (27 Ind. Cl. Comm. 39), the Commission determined that the Pyramid Lake Reservation was established on November 29, 1859. By its interlocutory decision of April 25, 1973, entered in Docket No. 87-A (30 Ind. Cl. Comm. 210), the Commission determined that by reason of the application of the *Winters*

doctrine, implicit in the creation of the Pyramid Lake Reservation was the reservation of sufficient water from the Truckee River for the maintenance of Pyramid Lake, for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish and for the other needs of the inhabitants of the reservation, such as irrigation and domestic use. The Commission further determined that an obligation on the defendant was thereby established with regard to the preservation of the Pyramid Lake waters and fisheries.

12. Following the establishment of the Pyramid Lake Reservation, the Indian inhabitants thereof became known as Pyramid Lake Paiute Indians and were organized as the Pyramid Lake Paiute Tribe. The water rights on which the claim of the Pyramid Lake Paiute Tribe for damages for deprivation of water is made in this case are the exclusive property of the Pyramid Lake Paiute Tribe, in which no other tribe or group of Indians has any right, title or interest.

13. The Commission finds, based upon the testimony of the witnesses, the record at all stages of the litigation, the representations of counsel, and all other pertinent factors before us, that the proposed compromise settlement of the Pyramid Lake water claim is fair to the parties and has been freely entered into by the Pyramid Lake Paiute Tribe and duly approved by the Commissioner of Indian Affairs.

The Commission has entered an order in Docket No. 87-A, separating the Pyramid Lake water claim from other claims in that docket and assigning the water claim to Docket No. 87-B. The Commission hereby approves the proposed compromise and settlement and will enter a final judgment in Docket No. 87-B in favor of the plaintiff, the Pyramid Lake Paiute Tribe, in the amount of

$8,000,000.00, subject to the terms and provisions set forth in the Stipulation for Entry of Final Judgment.

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL
Chairman

JOHN T. VANCE
Commissioner

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH
Commissioner

MARGARET H. PIERCE
Commissioner

/s/ Brantley Blue
BRANTLEY BLUE
Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 87-B

PYRAMID LAKE PAIUTE TRIBE OF THE
PYRAMID LAKE RESERVATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

FINAL AWARD

UPON JOINT MOTION FOR ENTRY OF FINAL JUDGMENT filed by the parties herein on July 2, 1975, pursuant to a Stipulation for Entry of Final Judgment filed with said motion, and, further, upon the agreement between the parties that no review would be sought or appeal taken from said final judgment, the Commission considered the evidence presented, both oral and written, at a hearing held on July 14, 1975.

THE COMMISSION, having this date entered findings of fact, which are made part of this order, concludes as a matter of law that the proposed settlement of the plaintiff's claim is equitable and just to both parties and that final judgment should be entered in accordance with the stipulation.

IT IS THEREFORE ORDERED that the Stipulation for Entry of Final Judgment is hereby accepted, that the Joint Motion for Entry of Final Judgment is hereby granted, and that the Pyramid Lake Paiute Tribe shall have and recover in Docket No. 87-B from the defendant the sum of eight million dollars ($8,000,000), subject to the terms and provisions set forth in the Stipulation for Entry of Final Judgment.

Dated at Washington, D.C., this 23rd day of July 1975.

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL
Chairman

MARGARET H. PIERCE
Commissioner

JOHN T. VANCE
Commissioner

/s/ Brantley Blue
BRANTLEY BLUE
Commissioner

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH
Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 87-A

THE NORTHERN PAIUTE NATION, *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

STIPULATION FOR ENTRY OF FINAL JUDGMENT

It is hereby stipulated, agreed and understood by and between the parties, through their attorneys, as follows:

1. One of the claims presented in this case on behalf of the Pyramid Lake Paiute Tribe is for damages suffered as the result of its not having received, since 1859 to the present time, all of the water to which it was entitled under rights reserved for it at the time of establishment in 1859 of the Pyramid Lake Indian Reservation.

2. On behalf of the Pyramid Lake Paiute Tribe, the United States, among other things, is now prosecuting a suit in the United States District Court for the District of Nevada, against the Truckee-Carson Irrigation District and others, to vindicate and confirm such rights.

3. Both the Pyramid Lake Paiute Tribe and the United States are convinced that, as of the date of the establishment of the Pyramid Lake Indian Reservation in 1859, there was reserved for the benefit of the Pyramid Lake Paiute Tribe the rights to sufficient water from the Truckee River for the maintenance of Pyramid Lake, for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish, and for other needs of the reservation, such as irrigation and domestic use. Both are convinced that such rights have

not been diminished or lost by anything that has happened or been done from the time of establishment of the reservation to the present.

4. The Pyramid Lake Paiute Tribe sued here solely for damages suffered by reason of not having received all of the water to which it was entitled under such rights, which it contends were reserved for its benefit in 1859, and are reserved for its benefit today. Specifically, the Pyramid Lake Paiute Tribe did not sue here for damages or compensation for the loss, diminution or taking of any such reserved water rights, but only for damages sustained by reason of not having received all of the water to which it was and is entitled under such rights, and no part of the award of damages to be entered pursuant to this stipulation represents damages or compensation for the loss, diminution or taking of any water rights.

5. The claim in this case, Docket No. 87-A, prosecuted on behalf of the Pyramid Lake Paiute Tribe for damages suffered by reason of its not having received all of the water to which it was entitled under such rights, which claim was the subject of the decision of the Commission entered on April 25, 1973 (30 Ind. Cl. Comm. 210), and which had been scheduled for trial before the Commission on January 27, 1975, shall be separated from all other claims in this case and shall be assigned to a new case, to be designated Docket No. 87-B.

6. Simultaneously, the plaintiffs, Northern Paiute Nation, et al., shall file with the Commission an amended petition in Docket No. 87-A, which shall expressly set forth all claims remaining in this docket. Any claim not expressly set forth in the amended petition shall be forever barred by this settlement. Such amended petition shall be accepted by the Indian Claims Commission as setting forth all remaining claims in Docket No. 87-A, which claims shall expressly exclude any claims for dam-

ages or compensation based upon acts of omissions of the United States prior to the date of execution of such stipulation that allegedly resulted in the loss of fish or fisheries, water or water rights reserved to the Pyramid Lake Indian Reservation.

7. All claims which were or could have been set forth in Docket No. 87-A, except as specifically reserved in the amended petition referred to in paragraph 6, above, shall be compromised and settled by the entry of final judgment by the Indian Claims Commission in Docket No. 87-B in the amount of $8,000,000 in favor of the Pyramid Lake Paiute Tribe. No review shall be sought of or appeal taken from such final judgment, and the United States shall waive any and all claims or demands for offsets or gratuities against the Pyramid Lake Paiute Tribe to date of execution of this stipulation.

8. The Pyramid Lake Paiute Tribe shall accept such award of $8,000,000 in full satisfaction and settlement of all damages sustained by it to date of execution hereof by reason of its having been deprived of water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation.

9. Although, as stated, both the Pyramid Lake Paiute Tribe and the United States are of the view that no water rights reserved for the Pyramid Lake Indian Reservation have been lost, diminished or taken by reason of anything that has happened or been done between 1859 and the present, and although the award of $8,000,000 to be entered pursuant to this stipulation is strictly for damages sustained by the tribe by reason of its not having received all of the water to which it was entitled under such rights, the tribe convenants, should it be finally judicially determined that, by reason of acts or omissions of the United States done or occurring prior to the date of execution hereof, water rights once reserved for the Pyramid Lake Indian Reservation were lost,

taken, subordinated to other rights, or otherwise diminished, that it will not again sue the United States to recover additional damages or sue for compensation for the loss, taking, subordination or diminution of such water rights. This covenant shall not extend to acts or omissions of the United States done or occurring after the execution of this stipulation that result in depriving the reservation of water to which it is entitled

EXHIBIT NO. U-439

FEDERAL FUNDING FOR THE PYRAMID LAKE FISHERY RESTORATION PROJECT

Fiscal Year	Source	Amount	Purpose
1973	Bureau of Indian Affairs	$ 20,000.00	Program Development
1974	Bureau of Reclamation	$ 49,925.00	Acclimation Research
1974	Office of Economic Opportunity	$ 600,000.00	To Begin Construction of Dunn Hatchery
1974	Congressional Supplemental Appropriation (Washoe Project Act)	$ increase 343,000.00	To Complete Construction of Dunn Hatchery & Net Pen System
1975	Bureau of Indian Affairs	$ 470,000.00	Operation and Maintenance Pyramid Lake Fishery Restoration Project
1975	Bureau of Indian Affairs	$ 580,000.00	Construction of Hatchery Related Facilities: Piers, Office Building, Landscaping, Parking Lot, Road Paving, etcetera.
1975	Office of Economic Development	$ 532,000.00	Fish Processing Plant
1975	Office of Economic Opportunity	$ 394,000.00	Ranger Patrol Program
1974-1975	Bureau of Reclamation (Washoe Project Act)	$ 7,749,000.00	Marble Bluff Dam and Fishway
1976	Bureau of Indian Affairs	$ 470,500.00	Operation and Maintenance Pyramid Lake Fishery Restoration Project
1976	Bureau of Reclamation (Washoe Project Act)	$ 404,000.00	Numana Fish Ladder and Fish Screen
	TOTAL	$11,612,425.00	
	NOW PENDING		
1976	*Congressional Appropriation (Washoe Project Act)	$ 2,148,000.00	Construction of Second Pyramid Lake Reservation Fish Hatchery

* Included in Senate version of 1976 Interior Department Appropriations Bill. Bill now goes to conference.

OTHER PYRAMID LAKE FISHERY RESTORATION EFFORTS

Lahontan National Fish Hatchery at Gardnerville (Undetermined part for Pyramid Lake)	
Construction Costs 1961-1975	$ 1,778,000.00
Annual Operation and Maintenance Costs from 1967-1975	$ 1,088,000.00
Lower Truckee River Interagency Fishery Evaluation Team Studies 1971-1975	$ 75,000.00
Construction and Operation of Stampede Reservoir 1966-1970 (Undetermined Part for Pyramid Lake)	$15,488,000.00
TOTAL	$18,429,000.00

EXHIBIT U-580 FIG. I-1 AT

Figure I-2

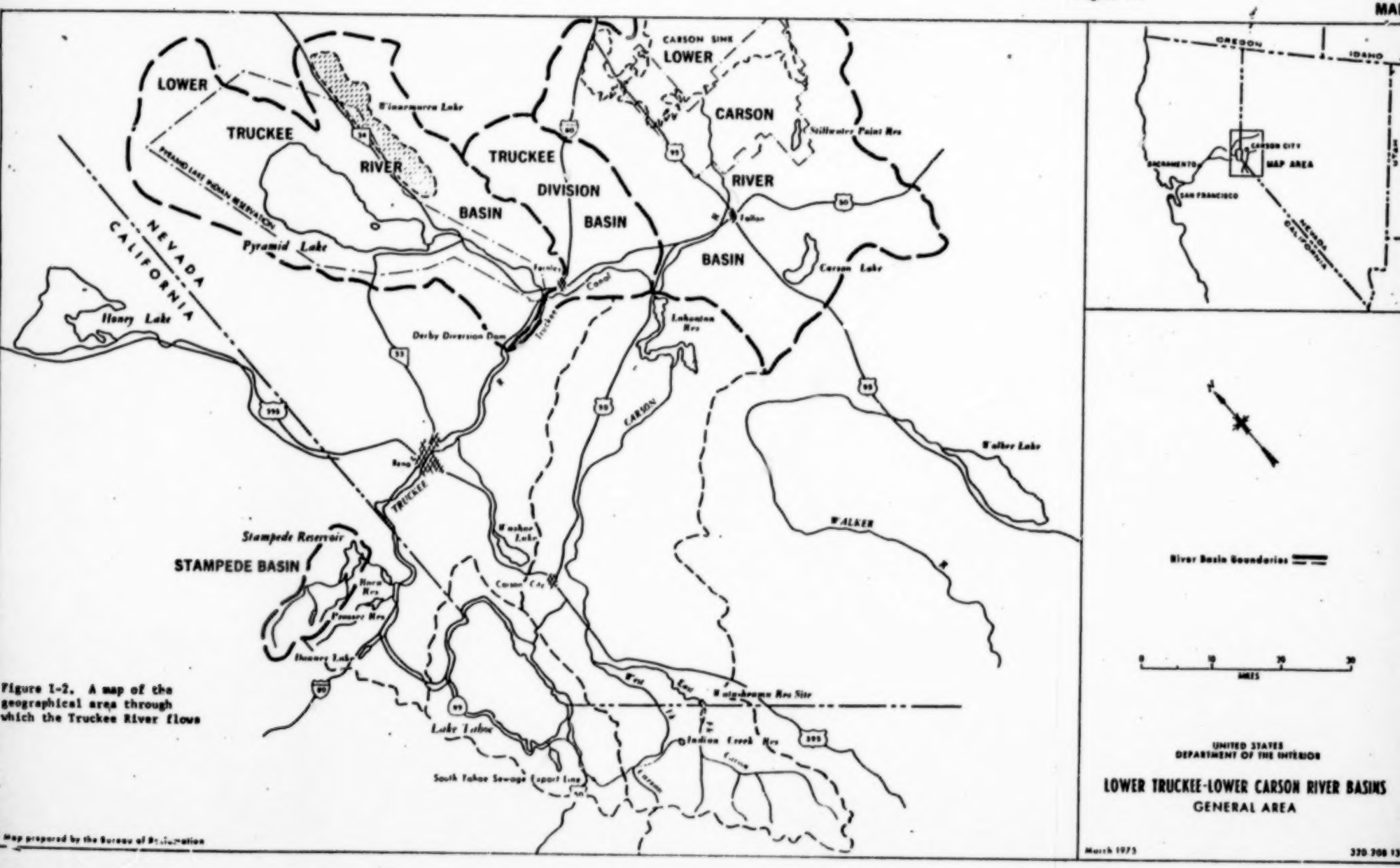


Figure I-2. A map of the geographical area through which the Truckee River flows

Map prepared by the Bureau of Reclamation

EXHIBIT A-20

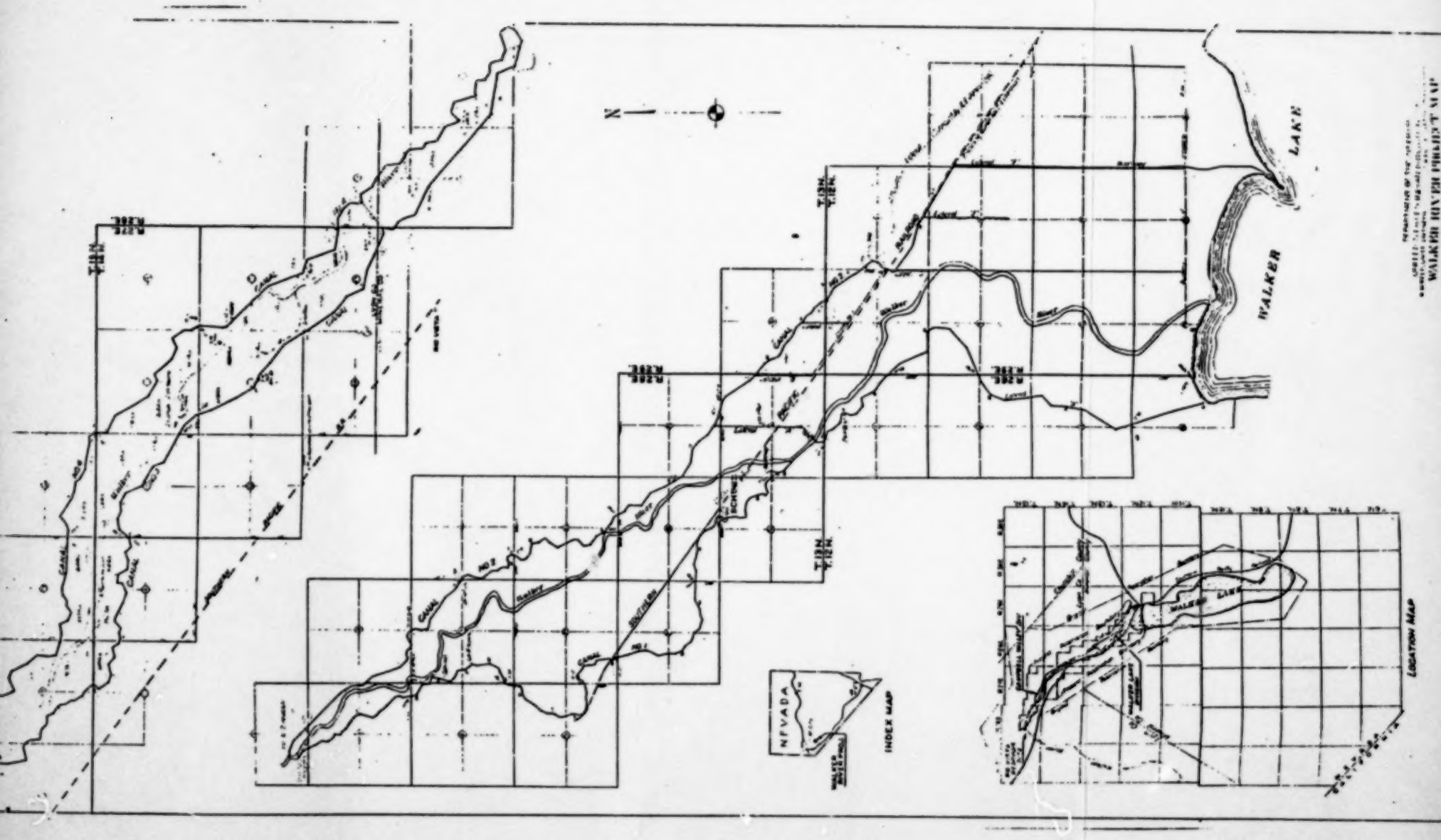
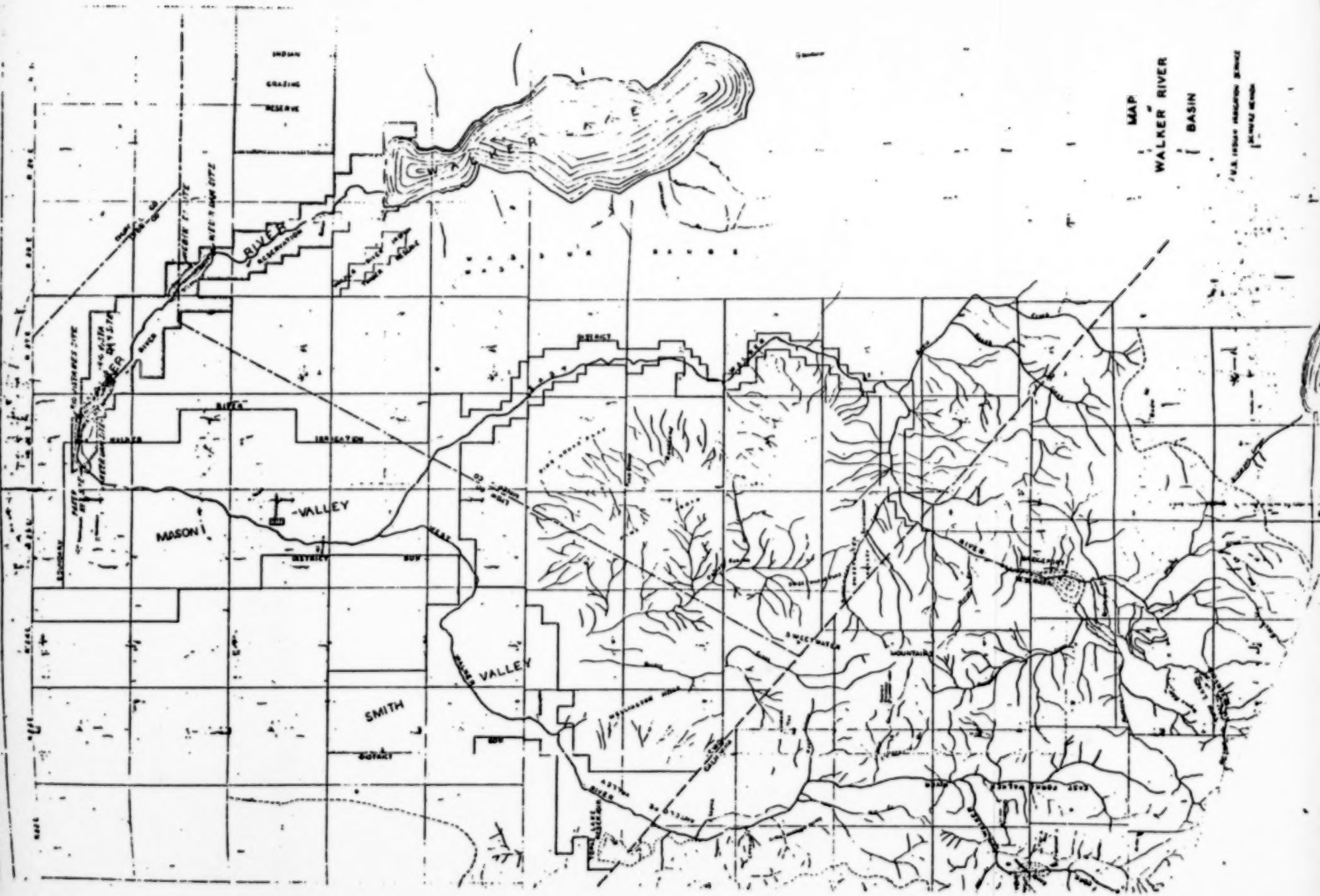


EXHIBIT A-21


MAP
WALKER RIVER
BASIN
INDIAN
GRAZING
RESERVE
RIVER
RESERVATION
MASON
VALLEY
SMITH
VALLEY

IV. TRANSCRIPT REFERENCES

[Testimony of Dr. James Hulse, expert historian, in response to questions by Harold A. Swafford, counsel for State of Nevada.]

[4379] Another thing that inevitably contributed to the decline of the fishery was the fact that the government, to a large extent the Indians, gave priority for agriculture over the maintenance of a fishery, to the extent that water was taken out of the [4380] river in volume for agriculture. The fishery was bound to decline, and I think that's well recognized.

And throughout, the government policy has been to emphasize agriculture.

* * * *

[4381] A. In examining the documentation, I could not find any evidence of a conflict of interest that mitigated against the litigation of the fishery question.

I asked myself whether there were things in the evidence that showed that the fishery question could not have been litigated because of some conflict of interest. That evidence doesn't exist, as far as I know.

A. There were opportunities for the Pyramid Lake Paiute Tribe to have exercised legal or political options which they didn't exercise in connection with the Orr Ditch case.

* * * *

[4437] I won't dwell on that aspect now, but it was clear to me that the making of them into farmers and herdsmen was a top priority reason for establishing the reservations in this area.

The correspondence that came out of this area relative to the Indian reservations, or those areas that they hoped to make Indian reservations, shows that again and again

they were interested in giving the Indians a possibility of agricultural pursuits.

If one looks at, for example, the Annual Report of Indian Affairs, the Annual Report of the Commissioner of Indian Affairs of 1874—this is only typical—one sees that emphasis.

* * * *

[4439] A. Reno Weekly Gazette, that's right, of July 29th, 1880. It describes a visit by the Secretary of the Interior Carl Schurz to the Pyramid Lake Indian Reservation.

Mr. Schurz talked about the fishery out there as an asset. He also talked and obviously was greatly interested in the agricultural potentiality.

After he left the reservation, some money became available for the improvement of the dam and the ditch, and Agent Spencer got the Indians to work on the ditch, and he has a letter in which he is reporting to Washington his progress.

This letter is dated October 26, 1880 to the Commissioner of Indian Affairs.

One sentence of it shows that he had the Indians working on the ditch, even during the fishing season, or when they might have been fishing, but they said, "We can catch fish anytime. Fish or no fish, we must complete the ditch."

No one of these items perhaps is more impressive than another, but the whole sequence of [4440] letters and reports through the 1860's and 70's and into the 80's suggests a preference for agriculture.

There are some letters from Fred Spriggs, Agent for this area in 1899, July of 1899.

I have numbered this one A134. He describes the effort to put more water on the land, and the emphasis on agriculture is clear.

A135 from Mr. Spriggs says specifically, "Farming, including stock raising, is the sole industry upon which the future generation will have to depend for a living,

and without a perfect irrigation system nothing can be accomplished in this line."

* * * *

[4441] In 1910, it was indicated in the report to the Commissioner of Indian Affairs that some $39,000 was being expended on an irrigation project for the Pyramid Lake Indian Reservation.

I might point out that over the next few years more than $150,000 was spent, according to these records—I'm generalizing now; it's something in that range—on improving the dam and on improving the irrigation system, and that included the construction of the Numana Dam and the irrigation works.

I seem to recall a figure of over $200,000 that was mentioned in the 1930's on the Indians' irrigation project. I'm recalling this from memory.

But nothing comparable was spent by the United States Government to improve the fishery. That is another indication, I think, that agriculture on the reservation was given a higher priority than the fishery.

* * * *

[4446] Q. Professor, would you move now to your conclusion that there was no conflict of interest, which I believe you said defeated the right or ability of the government to have asserted the right for a fishery. I don't know if those were your exact words; you may want to rephrase that.

A. I tried to watch for any kind of evidence that would suggest a conflict of interest [4447] on the part of attorneys or others that might have mitigated against the possibility of putting this into litigation.

There were certainly competitive uses for the water. They wanted the water for different uses.

This is true on the reservation itself, as I have tried to point out. But as I read the Justice Department file and as I read the correspondence—let me back up and say, "The Justice Department file on the Orr Ditch

case," which we had in total, I believe—and as I read correspondence between the Department of Interior and the Bureau of Indian Affairs and the Commissioner of Fisheries, and so on, I couldn't see any conflict of interest that could in any way explain the failure to litigate the fishery question.

* * * *

[4453] None of these matters, as nearly as I can tell, would have prevented them from entering into the case in claim for a fishery. There was nothing in their efforts to represent both the Newlands Project and the Indian Reservation that automatically ruled out consideration of the fishery question.

* * * *

[4460] In looking at the government's complaint in the Walker River case, it's very similar to that in the Orr Ditch case. There was no reclamation projects, no Newlands Project on the Walker River—

Q. BY MR. SWAFFORD: Was the Walker River case involving an Indian reservation?

A. Yes, it was.

Q. Where was that?

A. The Walker River Indian Reservation is 90 or 100 miles southeast of here, which was established at the same time as the Pyramid Lake Indian Reservation.

Q. What Indians live there?

A. Paiutes, northern Paiutes.

[4461] Q. Excuse me for interrupting—

A. That's quite all right.

Q. —Professor Hulse. Please continue.

A. If there was a conflict of interest that somehow prevented the government from presenting a fishery right as part of its case in the Orr Ditch case, such a conflict of interest did not exist in the Walker River case, and the government did not present its case for a fishery there, either.

I know of no Newlands Project or any other large competing government interest in the Walker River case.

* * * *

[4462] But the Truckee-Carson Irrigation District had its own attorney, and in those cases where the United States Attorney, or deputy, was acting or writing a letter, it was normally quite often for the Pyramid Lake Paiute Indians, and he was not in that correspondence particularly looking out for the Truckee-Carson Irrigation District.

I could not find a conflict of interest, then, you see, when we get into the 1930's. The TCID had its own attorneys.

When the negotiations began toward forming a Truckee River agreement which would allow for the building of more upstream storage on the Little Truckee River, in that correspondence Ethelbert Ward was looking out for the interests of the Indians. He was not representing the Truckee-Carson Irrigation District or the Newlands Project.

During these years there was correspondence to and from the Indian Irrigation Service. Mr. Engle made another report in 1929. The Clotts report is A468, prepared in December of 1934, and these people made recommendations for irrigation improvements on the reservation.

When it came time for Ethelbert Ward to [4463] look at the Truckee River agreement, he insisted that the agreement contain a provision that was more protective of the Indians' rights for irrigation of the benchlands, and he did that. He asserted the Indians' rights to benchlands, water for the benchlands, even though they had never irrigated them, against the wishes of the attorneys for the Washoe County Conservation District and the Truckee-Carson Irrigation District. There's a great deal of correspondence in the file on that point.

I could read some statements from Ward on this point. Document A450 which Ethelbert Ward wrote to Roy W. Stoddard, who was then representing the Truckee-Carson Irrigation District, saying "I shall do everything in my power to protect the Indians' rights."

Now, Mr. Stoddard of the Truckee-Carson Irrigation District was trying to find the basis for an agreement that would finally close this decree, and would make it possible to get the parties together in a manner that would permit the United States Government to go ahead and build a reclamation dam upstream. They didn't want to build a dam while that decree was still open.

Ethelbert Ward, when he looked at the [4464] temporary restraining order, was dissatisfied with Claim No. 2. Claim No. 2—am I going into too much detail here? I'm sure you know what Claim No. 2 is.

Q. You are doing fine, Professor. Thank you.

A. Claim No. 2 was the one that provided that each Indian on the reservation should have five acres of land, but if five acres of land were allotted to each Indian, the water to irrigate that land would be available in the duty of water as specified.

Now, Ethelbert Ward was aware that the Wheeler-Howard Act was about to become law, the legislation which became the Wheeler-Howard Act was going to become law.

If that became law, he knew, that would in effect repeal the 1904 statute which had provided for the allotment of land. And if that happened, then the Indians might well lose whatever water right they had under Claim No. 2, because that claim was contingent upon the allotment of land. At least that's the position he took.

So he, while negotiations were going on in Washington among the Washoe County Water Conservation District and TCID and the United States [4465] Government, Etelbert Ward insisted that the Department of

Interior determine how many acres of land were planned for cultivation and for assignment to the Indians so that that particular claim could be firmed up.

And there were decisions made on that basis. It was finally assumed, I think, that the Department of Interior said something like 2745 acres of land are planned for cultivation on the bench.

It was that acreage, that amount of acreage which Ethelbert Ward insisted be given a water right under Claim No. 2, and the allotment provision was not one of the conditions for it.

When that was learned—I might also say that they got a higher duty of water for Claim No. 1 at the time the Truckee River agreement was being negotiated.

There were complaints in this area, in the Fallon newspaper, and so on, because more water was being developed for t. Indians.

But at least in that instance there was no conflict of interest that kept Ethelbert Ward from representing the Indians.

• • • •

[4470] The government attorney, I think, Ethelbert Ward, thought that they had won everything they had a right to, everything that they had asked for in the temporary restraining order, and he was trying not to lose any of it. As a matter of fact, he was trying to gain a bit more precision.

The Walker River case, as you know, was decided by Judge St. Sure. Now, I don't have the date of that here, but it was in late 1935 or early in 1936, as I recall. And in that case Judge St. Sure did not give the Indians of the Walker River Reservation a reserved Winters Doctrine Right, and he didn't give them the irrigation that the government had asked for.

Within a couple of days after that, very close to that time, Harold Ickes signed the Truckee River Agreement on behalf of the government [4471] with the defendants.

• • • •

THE WITNESS: I'm just relying on memory here and I don't have a note, but in effect the decision gave the Indians the right to water on the basis of how much land had been irrigated, the historic use of [4472] water as opposed to a reserved right, as they had been given under the Orr Ditch case.

That District Court decision was, of course, appealed to the Ninth Circuit Court, and Judge "Schuler's" decision was overruled on that point and the Indians were, indeed, given a reserved right. But at the point when Judge St. Sure's decision came down, I think there was some alarm or concern, at least locally and among the attorneys, and Harold Ickes, the Secretary of the Interior, signed the Truckee River Agreement on behalf of the government.

Within a matter of a few days—I think one or two days after that decision became known—now, whether that's coincidental, I'm not sure, but in any case, the government did sign the Truckee River Agreement, and thereby, as they thought, protect for the Indians the rights they had under the Orr Ditch Decree and those improvements that had been made on their behalf by Ethelbert Ward in 1935, in the negotiations of 1934 and 1935.

Having read that sequence of documents, I had to conclude that there was no conflict of interest there that worked to the disadvantage of the Indians.

[4473] • • • •

I might mention Documents A606 and 607. These are letters. I think both of them are from Mr. Roy Stoddard.

I might say that Roy Stoddard had initially been the attorney for TCID. He left their service in about 1934 and worked briefly for a group of Fernley water users.

In about 1937 he became associated with Ethelbert Ward in the Walker River case, and he did serve to represent the government's interest in that case, and when the case was appealed to the Ninth Circuit Court, he was one of the attorneys participating in that appeal.

Ethelbert Ward disappeared from the correspondence in about 1937. I don't know what happened to him, but his name does not appear.

In the last two or three years, when the Orr Ditch case was still before the Court, Roy Stoddard was the local attorney who served the United States Government. But his function in closing the case—and I read the whole Justice Department file in the case—his function was primarily again to defend [4474] the Indians' rights against those defendants who were trying to change the decree.

One of the last days in court, the motions were made to strike the Indians' water right under Claim No. 2 on the grounds that they had never been used.

And in the correspondence of Mr. Stoddard—I mentioned A606—and he worried about it—A606 is Stoddard to the Attorney General, May 15, 1944—and he spelled out the history of his participation, asked whether he had a conflict of interest or whether the government wanted to put someone else in it. He was addressing himself specifically to a claim on one of the ditches, on the Highland Ditch, I think, and he indicated that he had represented another interest in the trial at one time.

Document A607 is the letter from J. Edward Williams to Roy W. Stoddard. J. Edward Williams was in the Attorney General's office. This is dated May 25, 1944.

The Attorney General's office in effect said "We don't think you have any conflict of interest."

In the last weeks before the filing of the final decree, there was some worry that the defendants would come in and would try to show that [4475] there had been no evidence submitted to sustain an Indian claim to bench-land water rights.

Stoddard apparently looked at the file, and he couldn't find immediately the testimony on which Claim No. 2 had been based on which the water—the Special Master had granted Claim No. 2.

And Stoddard said "We must resist the reopening of the case, or we must try to protect that right." He was afraid that if they tried to bring in evidence on that point, the whole case might be reopened, and he resisted any effort to remove the government's—the water right to the benchland under Claim No. 2.

A final order that was entered by Judge Norcross was essentially the Truckee River Agreement of 1935—approved in 1935 and 1936.

* * * *

[4483] A. In looking through the files and records of the Pyramid Lake Paiute Tribe which were deposited at the University of Nevada about ten years ago, I looked strenuously and expectively for a file on the Orr Ditch case and I didn't find one.

I thought that there would be some expression of interest or approval or disapproval or disappointment, but it does not appear in any of the minutes that I was able to see, nor in any of their correspondence.

But there is a great deal of correspondence and a great deal of discussion in the tribal meetings and so on about the so-called Squatters case that was also going forward—or the Squatters cases that were going forward at the same time.

You may recall that there were lawsuits brought by the United States Government to evict certain squatters from lands down on the Lower Truckee River, lands that were on the Indian Reservation, but [4484] onto which people had moved.

And the United States brought suits against the Ceresola and Garaventa families, and so on. I don't have a list of all the cases.

The Indians were very interested in those cases, and they talked about hiring attorneys, hiring their own attorneys in order to get those cases moved along more rapidly.

The cases did move slowly by their standards, and they felt that there was political interference that was stopping the United States Government from acting.

The constitution and bylaws of the Paiute Tribe, approved January 15th, 1936—I have listed this as Document A704—contains that paragraph which is very similar to the language in the Wheeler-Howard Act, that the tribal council had power, among other things—and I'll quote one paragraph—"To present and prosecute any claims or demands of the Pyramid Lake Paiute Tribe, to assist members of the tribe in presenting their claims and grievances at any court or agency of the government, to employ representatives or counsel for such services, the choice of counsel and the fixing of fees for counsel and representatives to be subject [4485] to the approval of the Secretary of the Interior."

That's one section of the constitution and bylaws.

And the minutes of the Pyramid Lake Paiute Tribe show that on a number of occasions under that provision, on at least two or three occasions, they sought to employ counsel and their petition to employ counsel was turned down in Washington by John Collier of the Office of Indian Affairs in that case.

The minutes of the Pyramid Lake Paiute Tribe for February 1st, 1936, I have labeled as Document A705, and they held a meeting on that date "To decide on agreement and selecting an attorney to represent us in our claim in Washington."

This was an attorney to help push along the white squatters case.

I might note another part of the minutes. There were minutes for January 13th, 1938, A706, were the minutes of a meeting held January 13th, 1938.

Part of it says: "After waiting patiently over two years for the failing of an eviction suit by the U.S. District Attorney which they put off and on, proposed by Councilman Sam Kay, I move that we hire a lawyer to sue the white ranchers to make them [4486] get off

our land and we ask Congress to appropriate some of our tribal funds to us to use that way, and that we have a committee to see a lawyer and to write the Secretary of the Interior to get his approval on this lawyer and his fee, like our constitution says."

They sought at that time to hire H. R. Cooke as their attorney. I understand that Mr. Cooke agreed to be their attorney. That appears somewhere in the minutes.

But once again, their effort to hire an attorney as a tribe was turned down.

I know of no comparable effort to hire an attorney or to raise a protest in the Orr Ditch case. They were certainly very sensitive to the possibility of hiring an attorney in the squatter case. I expected to find something similar in the Orr Ditch case and did not.

* * * *

[Cross examination of Dr. James Hulse by Michael R. Thorp, counsel for United States of America.]

[4518] Q. In about the year 1859, did the government decide it was time to find a reservation for these Pyramid Lake Paiute Indians?

A. The Utah Superintendency, under the direction of a man named Forney, instructed Major Dodge [4519] in this area to establish Indian farms in the letter that he wrote on October the 6th. This is the letter from Forney to Dodge on October 6th, 1858.

He advised him to come into Western Utah Territory, the Humboldt Region and westward, and to locate an Indian farm or farms in such areas as he decided were appropriate.

He specifically suggested that the Indians of the Humboldt Valley might well be placed upon a farm in the Carson Valley.

There had been, you see, in Utah Territory, five Indian farms established when Brigham Young and his successor, "Garland Hurt" were in charge, who worked in that field for a while, and Forney.

These men were trying out the idea of Indian farms, and five had been established in the Central Utah Valley.

And when Major Dodge was instructed to establish an Indian farm in this area, it was a sequel. It was a logical development from that previous experience.

* * * *

[4689] Q. To the best of your knowledge, sir, who was the first attorney the Tribe ever sought to hire?

A. The Tribe sought to hire H. R. Cooke in 1938, I believe. I made reference to that yesterday.

Q. What did the Tribe want to hire him for; do you recall?

[4690] A. They were seeking to hire him in connection with the Squatters case, so-called white squatters they were trying to remove from the land on the reservation.

Q. Did the government ever approve a contract for Mr. Cooke?

A. No, I think they did not.

Q. Do you know why they did not?

A. As I recall, John Collier wrote a letter saying, "We don't think it's necessary; the United States Attorney is representing you. You don't need an attorney for that purpose."

Q. What was the United States Attorney representing the Indians in, specifically?

A. In the white squatters case.

Q. I see. And what was this time period?

A. I'm thinking of 1938. Now, I believe there was more than one effort, and I provided those dates, I think, yesterday, the dates on which the minutes of the Tribal Council expressed interest in that point.

Didn't I mention the documents—maybe I can find those document numbers.

The minutes of the Tribe that deal with that were Documents A705, of February 1st, 1936; [4691] A706, January 13th, 1938; and A707, of February 21st, 1938.

It's my recollection that those were the three that I referred to specifically.

Q. Let me see if I have this straight. Please correct me if I am wrong.

Approximately 1938 the Tribe at least showed some desire to hire one H. R. Cooke to represent them in the Squatters matter; is that correct?

A. Yes.

Q. Now, this contract was never approved by the government for the reason that the government felt that the government itself was going to represent the Indians in this matter; is that correct?

A. That's my understanding.

Q. Do you know when the squatters were finally ejected or evicted from the reservation, sir?

A. I haven't pursued that in detail. A judgment was handed down in 1942 or 43, and there was an appeal to the Ninth Circuit Court, and it was some years after that before eviction actually occurred.

But I haven't pursued the history of that episode. It went on into the later Forties, as [4692] I recall.

Q. So it would be your testimony, would it not, sir, that this first attempt by the Pyramid Lake Indians to hire counsel was a failure; isn't that right?

A. If that was the first attempt; I don't know. That attempt was a failure in terms of hiring private counsel.

Of course, in the long run, government counsel did secure the eviction of several of these squatters.

Q. But by 1944—keep that date in mind—the only attempt to hire counsel on the part of the Pyramid Lake Indians had been a failure; is that right?

A. I don't know that that was the only attempt.

Q. The only attempt that you know of?

A. The only attempt of which I am familiar, yes, that one failed.

* * * *

[Cross-examination of Dr. James Hulse by Robert C. Pelcyger, counsel for Pyramid Lake Indian Tribe.]

* * * *

[4703] Q. BY MR. PELCYGER: Do you agree with the following statement, please, yes or no, Professor Hulse: Of course, by the time the Tribe was formed, the basic decisions had largely been made in the Truckee River Agreement?

* * * *

[4704] THE WITNESS: I think the answer would be yes, that the basic decisions had been made in that agreement by the time that the Tribe was organized.

* * * *

[4815] Q. Are you aware of any evidence that any government official urged the Tribe to retain its [4816] own attorney in the Orr Ditch case?

A. No, I'm not aware of any such urging.

Q. Are you aware of any evidence that any government officials ever indicated that government funds might be available for that kind of an undertaking?

A. No, I don't think they thought it was necessary.

* * * *

[4875] Q. Thank you. Now, you referred during your direct examination to Mr. Stoddard, and particularly to Exhibits No. A606 and A607.

A. Yes, I hold those documents.

Q. And you indicated that Mr. Stoddard raised a question with the Attorney General of the United States concerning any ethical problems that might be involved in his representation of the United States?

A. Yes.

Q. In light of his prior representation of both TCID and other defendants in that case?

A. Yes.

MR. GIRARD: I object. I don't believe—well, maybe he did say that.

THE COURT: There was some evidence to that.

MR. GIRARD: I know that Mr. Stoddard had written a letter, but I didn't recall the letter referring to him representing TCID.

Q. BY MR. PELCYGER: Would you check that, sir, in your A606?

A. It does mention in this letter that he [4876] had, after July 1, 1919, "When my firm became attorneys for Truckee-Carson Irrigation District at Fallon," and so on.

Q. Is there any mention in that correspondence, sir, that you have ascertained regarding a possible problem, similar ethical problem, insofar as Mr. Stoddard's representation of the Pyramid Lake Indians was concerned?

A. I encounter nothing there. His duty at that time, I should think, would be to protect the rights that were provided for the Indians under the temporary restraining order and the Truckee River Agreement, and he did that when those rights were challenged in the final hearing before the court.

* * * *

[4893] MR. PELCYGER: Could the witness be shown, please, Exhibit No. 262.

THE COURT: A, B, C, or D or U?

MR. PELCYGER: U-262.

[4894] (The Bailiff complied.)

MR. SWAFFORD: That would also, Your Honor, be A451.

THE COURT: It's also your A451, Dr. Hulse.

THE WITNESS: Thank you. Yes, I now have U-262.

Q. BY MR. PELCYGER: Would you look particularly, sir, at the last paragraph on Page 2. That continues over onto Page 3.

A. Yes.

MR. PELCYGER: And, Your Honor, I hesitate to do this, but I think this is extremely important, and I would ask the witness to read that at this point.

THE COURT: Go ahead.

THE WITNESS: Where would you like me to begin, "In view of the Wheeler-Howard Bill"?

Q. BY MR. PELCYGER: Yes.

A. "In view of the Wheeler-Howard Bill now pending in Congress, which we understand meets with the approval of the President, it is possible that if the bill becomes law, the entire Pyramid Lake Indian Reservation will be turned over to the Indians and no allotments will ever be made.

[4895] "If this should be done before a final decree is entered in the Orr case, the Court, in my opinion, should insert a provision in such decree reciting the reservation by the Government in 1859 of sufficient water to irrigate in the future all the lands of the reservation which will be needed by the Indians for agricultural uses.

"Investigations of the Reclamation Service and others on behalf of the Government show that there are approximately 19,000 acres of irrigable benchlands on the reservation to be supplied with water as part of the Newlands Project, and approximately 4,000 acres of bottomlands that are susceptible to irrigation, of which 3,130 acres were actually being irrigated by the Indians in 1926.

"Under the rule in the Winters case, the Government in 1859 reserved the waters needed for irrigation of such portions of these 23,000 acres of reservation land as the Indians might need for agricultural purposes," unquote.

Q. BY MR. PELCYGER: Now, that's a document that you are familiar with, sir?

A. I had seen it. I had forgotten this part of it.

[4896] Q. What is the "A" number on that?

A. I'm sorry. The Court said—

THE COURT: A451, according to Mr. Swafford.

Q. BY MR. PELCYGER: That was referred to during your narrative, wasn't it, sir?

A. Yes, it was.

Q. And during your direct testimony?

A. It was referred to, yes.

Q. Now, what was the reaction then—would you look at Exhibit No. U-263, please.

A. U-263?

Q. Yes.

(Document handed to the witness by the Bailiff.)

Q. BY MR. PELCYGER: I don't see this listed in your list, sir.

A. It may be. I don't remember seeing this.

Q. But it's in that sequence; this is Mr. Stoddard's first letter, comenting on Mr. Ward's proposal.

Do you recall that, sir?

A. Yes—I'm sorry. I was looking at the narrative here.

Would it be useful for me to read what [4897] I put into my narrative, which is a better comment—

Q. No. I'd like you to refer to the primary document, sir.

A. Good. All right.

Q. Now, I would ask you to refer to Page — the pages aren't numbered in the exhibit, but it's the fourth sheet, Page 4 of the memorandum.

A. Are we looking at the memorandum or Assistant Attorney General Blair? Is that correct?

Q. Yes. By whom, sir?

A. Roy W. Stoddard.

Q. And again, what's the date on it?

A. May 21, 1934.

Q. Now, sir, would you read the last four paragraphs on that page to yourself, please.

A. We are looking at the fourth page, the Truckee-Carson Irrigation District? I'm sorry. I may have missed—you wanted me to read from—

Q. No, I don't want you to read. I want you to read to yourself the paragraph on Page 4 of Exhibit No. U-232, beginning "Discussing Mr. Ward's memo."

I'm sorry, U-263.

A. And you are referring me to the fourth [4898] page, the last paragraph; is that correct?

Q. No, I'm referring to you to the last four paragraphs.

A. I see.

Q. And also the first paragraph on Page 5.

A. Good. (Witness complied.)

Q. Is it quite clear, sir, that Mr. Stoddard understood Mr. Ward's proposal to be the inclusion of 19,000 acres of benchlands under Claim No. 2 of the proposed final Orr Ditch decree?

A. That's correct.

Q. And would you paraphrase, please, Mr. Stoddard's response in this letter on the part of TCID to that proposal.

MR. ~~GIARD~~ Girard: Wait a minute. Is there any evidence that this letter is on the part of TCID?

Q. BY MR. PELCYGER: Well, read the last paragraph of the letter on that page, sir.

THE COURT: Go ahead, please.

THE WITNESS: The last paragraph on Page 4 reads: "The Truckee-Carson Irrigation District and the Newlands Project are not involved for the reason that their priority is as of 1902 in any event, and the Truckee Meadows lands being senior [4899] to the Newlands Project rights to the extent of about 28,000 acres.

"The adverse effect of a claim for an additional 19,000 acres of Indian land with a priority of 1859 would be to the detriment and the damage of the old settlers in the Truckee meadows, rather than as and against Truckee-Carson divisions of the Newlands Reclamation Project."

Q. No, I don't think you read the last sentence properly.

A. I'm sorry.

Q. I guess it's all one big sentence.

A. It's all one sentence. Shall I read it again? If I missed a word, I apologize for it.

"The Truckee-Carson Irrigation District and the Newlands Project are not involved for the reason that their priority is as of 1902 in any event, and the Truckee meadows lands being senior to the Newlands Project rights to the extent of about 28,000 acres, the adverse affect of a claim for an additional 19,000 acres of Indian land with a priority of 1859 would be to the detriment and damage of the old settlers in the Truckee meadows, rather than as and against the Truckee and Carson divisions of the Newlands [4900] Reclamation Project."

I read too hastily before.

Q. And then the first paragraph on the next page, please.

A. "If such a claim is insisted upon on behalf of the Indians, the matter will doubtless be thrown into court for determination by it, and of course any further attempt to dispose of the matter by stipulation and construction of a reservoir will be useless."

Q. Now, did Mr. Stoddard subsequently have occasion to revise his opinion as expressed in Exhibit U-263 regarding the impact of the addition of 19,000 acres of irrigable lands on the Newlands Project?

A. Did he subsequently have occasion to modify his position?

Q. Yes, sir.

A. He says here, of course, that if a claim for 19,000 acres is asserted, it will be opposed and the matter will go into court.

As a matter of fact, that claim was not asserted—

Q. No, sir, that wasn't my question.

Does he say in this letter, in the [4901] paragraph that you read, that the impact, the adverse impact of such a claim would be felt not by the Newlands Project, but rather by the interests in the Truckee meadows?

A. That is his assertion in that paragraph.

Q. Did he subsequently have occasion to correct that assertion?

A. I'm not—I don't know. I don't know what you are referring to.

Q. Well, I would direct your attention, to your Exhibit No. A452, please.

(Document handed to the witness by the Bailiff.)

THE WITNESS: A452?

Q. BY MR. PELCYGER: Which is also Exhibit No. U-265.

MR. JOHN SCHROEDER: May 26, 1934.

MR. PELCYGER. Part of the sequence, Your Honor, is also Exhibit No. U-264, which I will not bother to read at this time.

THE COURT: Very well.

Q. BY MR. PELCYGER: Is that letter familiar to you, sir?

A. Yes, it is. I should have remembered [4902] this one. This was written five days after the previous agreement, and in this he does say, "After reconsidering the statement above quoted, I now desire and do withdraw the same for the reason that after telegraphing Mr. Stuver, the project manager and engineer of the Newlands Project and of the Truckee-Carson Irrigation District at Fallon, I am advised that the proposed increased diversion rights recommended by Mr. Ward in the Truckee River final decree, in addition to the rights determined and found by the federal court in the temporary restraining order entered in the Truckee River suit for 19,000 acres of Pyramid Lake Indian Reservation benchlands, will not only be detrimental and prejudicial to the Newlands Reclamation Project, but in fact so injurious as to cut off any available water from the Truckee River for the irrigation of the project lands after the run off season, if such additional rights are awarded by the federal court to the Indian lands as suggested and recommended by Mr. Ward."

I have reference to that in the narrative. I had forgotten that sequence.

Q. BY MR. PELCYGER: And you referred to that in your direct testimony also, didn't you, [4903] sir?

A. I think I did, yes. I had forgotten that he was requesting 19,000 acres at one point with an 1859 priority.

Q. And you had forgotten, sir, that Mr. Stoddard changed the opinion that he had originally expressed in his earlier letter?

A. I didn't remember that sequence.

MR. PELCYGER: One last thing, Your Honor, cognizant of the time.

Q. BY MR. PELCYGER: Does he then go on in Exhibit A451 on the top of the second page to request the insertion of a new paragraph in lieu of the paragraph you previously read from Page 4 of the earlier memorandum?

A. He does suggest the insertion of a different paragraph.

Q. And that paragraph basically is in accordance with the paragraph that you previously read to the effect that if the inclusion of 19,000 additional acres of benchlands for the Indians with an 1859 priority, it would destroy the Newlands Project; is that right?

A. Yes, it would "for all practical purposes destroy the water rights hitherto sold by the [4904] United States, through the Secretary of the Interior, for the irrigation of the benchlands of said project."

Q. Thank you.

• • • •

[4911] Q. Does that indicate that Roy Stoddard was acting as sort of a representative of all of the Nevada interests?

A. Roy Stoddard was working with these other people against these added claims on behalf of the Indian Bureau, which seems to be contemplated, or seemed to be possible under Ethelbert Ward's [4912] letter.

• • • •

[4930] Q. Does that letter indicate to you, sir, that the conflict of interest between the water requirements for irrigation and the water requirements for fish worked to the detriment of the Pyramid Lake Indians, insofar as the assertion of a claim in the Orr Water Ditch case for fish is concerned?

A. Certainly the Department of Interior officer who wrote this letter believed that that conflict existed, and therefore that the matter could not be litigated.

That does not mean there was not sufficient information or that other views were not being expressed also.

Q. Is the answer to my question "yes, sir"?

A. It does indicate that in his mind there was such a conflict, yes.

Q. And he was acting for the Secretary of the Interior?

A. That appears to be the case.

Q. Is it to that extent, then, sir, inconsistent or at least contrary to the conclusion that you reached on the subject, sir?

[4931] A. No, I should think this is one of the sequence of letters. There are others, I believe, that help put into perspective this letter.

Many people in the Department of Interior did feel that agriculture was superior, that agricultural water interests were primary, that the fishery question was secondary. There were competing uses for the water.

Q. And that's why the fish claim wasn't presented?

A. I'm not sure why the fish claim wasn't presented. I don't have concrete evidence, but I have a guess that that is a factor.

Q. If that's the case, sir, how could it be in your conclusion, sir, that the conflict of interest, the Government's conflict of interest between the irrigation requirements on the Newlands Project and the fish requirements at Pyramid Lake did not work to the prejudice of the Pyramid Lake Indians?

A. Did not work to the prejudice of the Pyramid Lake Indians?

I said this particular conflict of interest did not prevent the attorney for the Government from having presented a claim for the [4932] water for the fishery, even though it was not done in 1929 or thereafter. That claim, I think, might have been prevented.

The point of view different from the one expressed by Mr. Dixon might have been expressed, might have been government policy, and the decree might—

Q. Are you saying that it's theoretically possible, sir, that a different view than the one which actually did might have prevailed?

A. It is possible.

Q. It's possible, but it didn't happen, right, sir?

A. It did not happen. The Government did not present a claim for a fishery, partly, I assume, because of points of view such as this.

* * * *

[Examination of Edward L. Pine, Vice President of University of Nevada, Reno, by Edward C. Reed, Jr., counsel for State of Nevada.]

[4997] BY MR. REED:

Q. Mr. Pine, would you first tell the Court where you reside.

A. 330 Chevy Chase, Reno, Nevada.

Q. How long have you been a resident of the State of Nevada?

A. All of my life, which is 62 years.

Q. Would you tell the Court where you grew up.

A. I grew up in the Northern part of the state, particularly in the mining camps. My father [4998] followed mining, started out in Rawhide, from Rawhide to Reno, to Rochester, Broken Hills, Carson City, Reno again in the Northern part. And as I say, mostly mining camps.

I have owned and lived on the Truckee River, first in the early 1920's where the Holiday Hotel is now, that's our original home, and we still own the property.

I have spent probably most of my time in or around Reno, but considerably around the state.

* * * *

[4999] Q. BY MR. REED: Dr. Pine, did you live in Hawthorne for a while?

A. Yes, sir. I finished my last two years [5000] of high school. I worked there and finished high school in Mineral County.

Q. By the way, in that connection, are you familiar with the location of the Walker River Indian Reservation?

A. Yes, sir, I am. My grandfather lived at a little railroad siding on the east side of Walker Lake known as Knowland.

Prior to that time my grandfather lived at Rawhide, which was not too far from Knowland, and Knowland was the location of the mail, where they took the mail off the train and took it by stage to Rawhide.

I would visit my grandfather quite frequently and very often spend the summers with him, which was near the Walker Lake, just a quarter of a mile or so from his house.

* * * *

[5003] THE COURT: Let me inquire, Mr. Reed. Do you purport to establish through Dr. Pine the legal boundaries of the reservation?

MR. REED: No. I think Dr. Pine knows, having lived out there many years, having lived all this time in the State of Nevada, he knows at [5004] least what the people of that area believe to be the reservation boundaries.

I might also point out that he's a registered professional engineer, and so he has a little more expertise than the average layman who might have lived in Hawthorne or around Walker Lake or knowing where those boundaries are.

I'll ask him how he knows and to describe them, and then if Mr. Pelcyger wants to challenge that or present

a survey or something, I suppose that he's entitled to do that.

THE COURT: I think perhaps you had better attempt to lay a better foundation with respect to its admissibility, and I would assume then, if I admit it, it will be with the understanding that it's community reputation, based upon his observations living in the community, being familiar with it, that sort of thing, and certainly would not be conclusive upon a legal determination as to boundaries.

* * * *

[5005] Q. BY MR. REED: Dr. Pine, you have testified that you went to high school in Hawthorne?

A. Yes, sir.

Q. Would that be about the time when you'd have the first recollection of what you identified as boundaries of the Walker River Indian Reservation?

A. No. I was familiar with it earlier, because my grandfather lived within two miles of the boundary on the east side of the lake. That's the side that the railroad goes down, and there was a road alongside of the railroad on the east side.

MR. PELCYGER: May I request of the witness to confine his testimony at this point to qualifications and not to the geography of the [5006] reservation?

MR. REED: Well, I don't think I'm trying—

THE COURT: Well, the geography might play a part in his recollection of the matter.

When the witnesses uses the term "boundary," I'm not accepting it as such, Mr. Pelcyger. I'm accepting it in a context in which it's meant.

Proceed, Mr. Reed.

* * * *

After the time that you were there [5007] going to high school, have you had occasion to examine what was believed in that area to be the boundary of the reservation?

A. Yes, sir, I have.

Q. All right. And tell us how frequently and when you might have done that since that time and on up to the present.

A. Well, the boundary on the west side has been moved a few times, and I know about it because of passing the area, driving back and forth.

Later I was State Highway Engineer and was familiar with the highway construction.

Following the State Highway Engineer, I was president of a construction company and we rebuilt that section of the road, under contract with the State Highway Department, and I know where the Indian reservation was.

Q. Is it fair to say that you have looked at it a number of times over the years?

A. Yes, sir, it is.

Q. And as far as the people who lived in that area, was there a consensus that what you have identified as the boundary was the boundary?

A. Yes, sir.

Q. Incidentally, Dr. Pine, are you a [5008] registered land surveyor?

A. Yes, sir, I am.

Q. Have you ever surveyed that boundary?

A. I did not survey that boundary.

Q. Other than having gone to your grandfather's place and having been State Highway Engineer, was there any other reason than just living around the area that you were interested in where the boundaries were located?

A. Yes, because of the lake, the receding of the lake, and I have hunted in that particular area. There was at one time good goose hunting and duck hunting at that end of the lake, so I knew where it was, because you had to be outside the Indian area when you were shooting ducks.

Q. All right. Now, can you just give us an idea of what the boundaries look like? Are they fences, or

what sort of things have you believed to be the boundaries?

A. Fences, primarily fences.

Q. Are there any signs?

A. Yes, there are. I don't know if they are still there. There were signs and they are probably still there, but I'm not sure.

Q. Are there any other marks, like on the [5009] road or anything like that, which indicate where the boundaries are located, so far as you have observed?

A. On the highway, on the west side of the lake, which is U. S. Highway 395, at one time there was a cattle guard.

Gradually the road was increased in width, and eventually the cattle guard was removed because of its narrowness compared to the width of the highway, and they painted then on the pavement lines which would simulate, or simulating a cattle guard in order to keep the cattle from leaving the reservation, going out into the open land.

The reservation was fenced completely in an endeavor to keep the cattle from wandering through the highway, first by cattle guard and then by the paint.

THE COURT: Mr. Pelcyger, I will permit you to voir dire, but I don't believe that Dr. Pine is being called as an expert. I think it's on community reputation, his personal observations, and he doesn't purport to testify as to the legal boundary.

* * * *

[Voir dire examination of Edward L. Pine by Robert C. Pelcyger, counsel for Pyramid Lake Indian Tribe.]

[5010] Q. If my notes are right, sir, in 1924 you were approximately ten years old?

A. Yes.

Q. Do you know, or do you have any recollection of what the boundaries of the Walker [5011] River Reservation were in 1924?

A. No, I do not have a recollection of the total boundaries. I do know where the fencelines were.

Q. In 1924?

A. Yes, sir.

Q. And this period when you were more sure of the boundaries of the reservation, when was that, sir?

A. From the time I was in high school up to the present time.

Q. What were the years?

A. I finished high school in 1932, so from 1932, or that approximately period up to the present time.

Q. Are you aware, sir, that the boundaries of the reservation were considerably extended by an act of Congress in 1936?

A. Yes, sir.

Q. Do you know about how much the reservation was increased then?

A. No, I do not. I know it was increased both to the south and to the north.

Q. Do you have a pretty precise recollection of what the boundaries of the [5012] reservation were prior to that act of Congress in 1936?

A. I do not have a precise recollection of it. I know about where it was.

Q. Do you feel that you know about where the reservation boundaries were prior to 1936 in relation to Walker Lake, specifically?

A. Yes.

* * * *

[Direct examination of Edward L. Pine by Edward C. Reed, Jr., counsel for State of Nevada, continued.]

Q. I just have one other question for you, Dr. Pine. Based on these observations and the community reputation of where the boundaries were, would you tell the Court, let's say, from the first time you remember where the reservation was located in relation to Walker Lake and Walker River?

A. Walker Lake at one time went up almost to the Village of Schurz. As the lake receded, of course, now Schurz is several miles from the [5013] shoreline of the lake. And the Walker River flowed through the community of Schurz.

This particular portion of Walker Lake is the delta of the Walker River which dumps into Walker Lake.

The community of Schurz is now several miles from the lake, however. There is also a dam that was built by the Indians above Schurz known as the Webber Dam, and that controls the water they used for the operation of their community.

Q. At the present time does the Walker River Indian Reservation touch the lake, Walker Lake?

A. The Indian reservation touches it on the east side, and on the west side it comes down to approximately where the waterline is now.

The reservation has been extended as the lake has receded. At one time more of the lake was within the Indian reservation than is currently; that is, frontage of the lake.

Q. All through the time you have had a knowledge along these lines, has the reservation always touched some portion of the lake?

A. Yes, sir.

Q. What about the place where the river, [5014] Walker River, enters the Walker Lake, at that juncture, does the reservation surround that point?

A. Normally it has, and I think that it still does. However, the lake has been receding quite rapidly and it may not at this time. But I believe that it still does.

• • • •

[Cross examination of Edward L. Pine by Robert C. Pelcyger, counsel for Pyramid Lake Indian Tribe.]

[5149] Q. So, sir, if I understand your testimony, it is that to the best of your knowledge portions of the

northernmost part of Walker Lake were included within the reservation within the period 1924 to 1930, or thereabouts?

A. Yes, sir.

Q. But certainly not the entire lake?

A. The entire lake was not in the reservation, to my knowledge.

Q. And really only a pretty small part of it was, to the best of your knowledge?

A. That's right.

* * * *

[Direct examination of Omer C. Stewart, expert anthropologist, by Michael R. Thorp, counsel for United States of America.]

[8554] Q. Sir, have you reached a conclusion as to why the Pyramid Lake Tribe did not come forward during the pendency of the Orr Water Ditch case in an attempt to get the issue of a water right for the maintenance and preservation of a viable fishery in Pyramid Lake raised in that proceeding?

A. Yes.

Q. What is that conclusion?

A. It's a bit complicated. I should possibly break it up into various parts, but in its most succinct expression, it might be that the ancient culture patterns of the Pyramid Lake [8555] Indians and their experience from the time the whites had arrived in their territory had conditioned them to be retiring and backward, and because of these experiences they were not aggressively defending their rights, or pushing to maintain their position.

But to the contrary, they were neither sophisticated enough nor wealthy enough in either experience or money to press their case.

And further, they had been especially and deliberately conditioned to depend on the federal government, the Bureau of Indian Affairs, to take care of themselves, and since the federal government did not take them by the

hand and lead them into the hearings, it was impossible for them to individually and independently force themselves into those hearings.

MR. SWAFFORD: Your Honor, the State will object to this testimony and move that this be stricken. I don't believe that there's anything to rebut in that regard.

Dr. Hulse never got into any inquiry or into the fact that the Indians were or were not financially able, whether they were sophisticated, retiring, or whether or not they were conditioned [8556] in certain ways to depend on anybody, and that if this is true rebuttal, then we should be concerned only with the issues that Dr. Hulse has presented in his testimony.

THE COURT: Well, we are dealing not only, of course, with the facts as stated, but all reasonable inferences that might be drawn from it, and I'm sure that one of the inferences that perhaps one would draw from the total of Dr. Hulse's testimony were such things as Dr. Stewart has just mentioned.

The objection will be overruled.

Q. BY MR. THORP: Dr. Stewart, I'd like you to take your conclusion now and break it down and explain what you mean.

First of all, what do you mean by your statement that the Indians didn't have the necessary level of sophistication or understanding to have forced participation in the Orr Ditch case?

A. The basis of their sophistication and understanding, beginning in 1913, or 1913 to 1944, was, of course, a result of their history, what they started with when the whites arrived and what they had experienced up to that time.

The Northern Paiute were an extremely [8557] simple people. They had a very primitive and simple type of culture. Their whole way of life was geared to an organization of life not much more complicated than a single family.

Because of their very small population—at the highest numbers that we have calculated for the Northern Paiute was about 900, and that was at the very beginning of their relationship with the white settlers, and for most of the historic period their population was about 500. Five hundred total population would leave only at most 200 adults. Any community of 200 people is simple, can survive in a very simple fashion, from its political organization, social organization, and in general its way of life.

The Northern Paiutes, from my own questioning of old informants and what other anthropologists have recorded about them, did have a very simple social organization. They had a very simple material culture, so that they did not need a large organization to carry on their principal activity.

If, for example, they needed a leader for an antelope hunt, and they did have a special antelope leader, they selected some experienced [8558] man, or he arose and was accepted as leader for that purpose.

But they had no strong chieftainship and no one designated and experienced in protecting the welfare and looking out for the welfare of the people. Everyone had to more or less take care of himself.

When the Europeans arrived, the Europeans wanted someone to talk to, and so they selected people that seemed to be willing to talk with them, or were not too bashful, and so chiefs came to be named. Usually these appeared to have been the selections of the foreigners and not necessarily the generally elected people from the Tribe.

So that from this very simple basic way of life, both in physical and material culture and in non-material culture, they started having experiences and education from the European.

From the beginning, no one in Nevada seemed interested in educating the Indian. No one wanted them in the public schools. They weren't welcome in the public

schools. Missionaries were assigned, and the missionaries attempted to convert them.

[8559] But except for the very minimum of education through missionary schools, the Indians did not receive what we would consider even an adequate primary education.

One or two bright Paiutes made quite a big splash with a minimum of education.

Sarah Winnemucca Hopkins became a very remarkable woman with a few weeks of formal education.

But usually the system under which they were living had discouraged them from self-development, so that the leaders that arose frequently were discouraged from speaking out and speaking for their people.

Sarah Winnemucca Hopkins was a good example. She tried to help her people to gain what they thought they should have and she was insulted by agents and in every way discouraged, accused of being a loose woman, and in other ways they tried to make her out as an unreliable person.

The same was true with her cousin Natchez, who attempted to criticize the administration by the government and to gain what he thought was due the Indians, and the Indian agents sent him to Alcatraz, where he was released after a short [8560] time because there was no evidence that he had done anything wrong, except ask for what the Indians thought they deserved.

So that many experiences discouraged the Indians from asserting themselves or speaking out for what they may have thought was due them.

Q. Testifying as to your conclusion, you mentioned in part that the ancient cultural patterns that the Indians played, are there any patterns besides those you have already mentioned?

A. Other than the absence of experiences in leadership and their experience in themselves being genera, this was possible at Pyramid Lake because of the great richness of the fishery during the spawning run, where the large

trout were so numerous that all of the Indians of Nevada could not have made much of an imprint on this spawning run, so that Indians within walking distance were welcome to come and share this great food resource of the Pyramid Lake Tribe.

The notion, since they, at that period, could be generous to everyone, it discouraged or helped them to not develop. Now, whether you could be as positive as saying it discouraged it, but it did not encourage them to be provident, to be [8561] guarding of their resources, and if you had a long experience and a travel tradition of being generous and sharing what you have, to turn the other type, to develop the other type of that tradition would be a factor in inhibiting and developing this opposite tradition.

Q. Sir, also when you stated your conclusion, you mentioned that the historical experiences that the Indians had with whites contributed to their failure to come forward in the Orr Ditch.

Have you taken examples of this historical experience and broken it down into areas to help the Court understand what you are talking about?

A. Yes, I have. Various subheadings of these historical experiences, that I have tried to organize the materials into—

Q. Could you just give us your basic subheadings.

A. One of the first situations was, of course, the conflict of culture between the two cultural groups, the fact that the whites came with a very, very strong notion of their own dominance, their own importance, their right and demand to conquer and dominate in contrast to the [8562] Pyramid Lake culture pattern of generosity and friendliness and non-violence, and these experiences can be broken down.

For example, very soon Holeman mentioned in his first letter, but even before that, the experiences the Indians of Western Nevada experienced from what might be called almost military or group violence committed against them.

Then they had a great loss of their resources which would cause them to feel emptied and lacking in ability to control their destiny.

Besides their loss of their resources, which in itself was a very traumatic experience, individuals were singled out for murder, mistreatment, to such an extent that others who knew of this would be reluctant to come forward.

Other traumatic experiences were their experience of being lied to by government officials, by having promises made to them and having these promises broken, and having the whole position of complete futility and frustration and inability to take care of their affairs.

Direct examples of punishment for self-assertiveness—I have mentioned a couple—others could have been named. [8563] Then on another angle, we might say that they were subjected over the years to direct threats of the destruction of their reservation, the destruction of their whole way of life.

They never had a sense of security in their property. This lack of security, the sense of threatening, was partly, and the whole failure of the government to clearly define their territory, the failure of the officials to be told where the reservation boundaries were, and for decades the agents in charge of them would say "I don't know where the boundaries of the reservation is."

Now, someone knew. They had a right to know, because maps were available. But somehow these agents would say "Somehow I don't know" until the other trespasses resulted from this. So we have various non-Indians constantly trespassing upon them, trespassing with their herds of cattle, their sheep, trespassing on their fisheries, trespassing on their lands, the Squatters from the beginning until the 1950's.

Everybody knew they were squatting on the Indians' lands. The Indians knew it. The Squatters knew it. The officials knew it. The [8564] Squatters on the farms, the Squatters in the Townsite of Wadsworth.

The full record of that townsite is simply fantastic. Sometimes it was said it was sold. Sometimes they said it belonged to the railroad. Sometimes they said it belonged to the State. It's still within the reservation today, but no one knew and the Indians could never be sure they knew they owned a town lot or whether they didn't.

Many of the Indian agents in the government, the general land office had conflicting reports, and so there was a constant lack of security. The same was even true with the water itself. They were told they would have water.

The Bureau of Indian Affairs officials said, "You are going to become farmers. You need water for your irrigation. We are going to supply you irrigation," and then they didn't have water, so that their entire life up to 1913 was one of constant frustration, constant failure, constant lack of support and guidance, and living up to the promises that were made to them by the officials.

In addition, they were subjected to [8565] exploitation, discrimination, and every way tried to be held down and threatened with being dispossessed by the local citizens, through the newspapers and trespassers.

The big surprise is that the reservation exists and that the people themselves have been able to survive such traumatic experiences.

Q. Sir, you mentioned the Squatter problem, and there has been testimony in this case regarding that.

I just wondered and I'd like to ask you, now, isn't it true that during the history of that proceeding, that in this case the Indians did attempt to go forward and get something done about the Squatters and that they did at least attempt to get an attorney?

Doesn't this lie in the face of your conclusion that you have reached?

A. No. It is, of course, an example of the beginning of some sophistication, some knowledge.

The Squatter problem, of course, is a concrete one, like the trespassers on the fisheries.

The Indians complained about the Squatters and the trespassers on their fisheries, [8566] and even though

the agents were never able to discourage the Squatters, they did request redress. So that the attempts were made very early to solve the Squatters problem by selling the lands to the Squatters, or just declaring that part of the reservation open and then diminishing the size of the reservation.

Senator Stewart and Senator Nye submitted bill after bill into the Congress asking Congress to vote that the reservation—sometimes it was that the Walker River Reservation be abandoned entirely and all the Walker River Paiutes be moved to the Pyramid Lake Reservation. Senator Stewart said, "Well, just diminish the Pyramid Lake Reservation by half to give half the lake to the whites, and all of the best agricultural lands to the Squatters."

Those bills were presented in 19— well, certainly by 1890.

And even the agent suggested this. Several agents suggested that this would be the solution, and the Secretary of the Interior obtained a fund from Congress to negotiate with the Northern Paiutes for the sale of that part of their reservation. This was known as the [8567] Ormsby Negotiation.

In 1891 Congress voted $5,000 for a commission to go to the Pyramid Lake, and they went out there in 1892, and did talk the Paiute into selling two townships off their reservation, the best agricultural land which was involved with water, and the Indians agreed to it.

They were told, "Well, now, we have these Squatters and there's nothing we can do about it. Why don't you just sell the land and be paid for it?"

They said, "Well, since we can't do anything about it and no one has done anything about it, we'd rather have $20,000 that we were offered in 1891 than nothing," because they were getting nothing.

They didn't have the land and they were deprived of the water that was used on the land, and so they said, "Give us $20,000. It's better than nothing."

Unfortunately, when the report, signed by 133 Paiute and the Commission, friends of the Indians in the East realized that this was not in the best interest of the Paiute and they worked against it.

[8568] A member of the Board of Indian Commissioners opposed this, and they continued opposing other such bills, even in the 1890's, which would have deprived the Indians of their reservation.

But this was an educational experience, to have three outstanding men from New England come and sit around and talk to them for two or three weeks and asking their opinion. It was marvelous. They felt great.

"Here we are important, because, see, they are coming and talking to us." And so they were talked into selling their reservation, but when it wasn't approved and Congress refused to accept that bill, then the same old story went on.

But that one experience would have helped them to consider the possibility of gaining help later.

It wasn't, though, until after the Indian Reorganization Act, which again was an important educational experience, when Superintendent Bowler was here, and was also helping to educate the Indians, that they actually proposed to hire Mr. Cook to help the government attorneys, who seemed to be dragging their feet [8569] to dispossess the Squatters.

Q. Was that attempt a success?

A. No. The Bureau of Indian Affairs did not approve on using the funds to hire the private attorney.

Q. Just one more point I wanted to cover generally in that area, Dr. Stewart, and that was that you mentioned the effect of individual punishment might have had on the Tribe as a whole.

Can you give us an example of that?

A. Yes. The most blatant example was the murder of Truckee John, who established his farm on the river, and in 1867 was shot by Mr. Fleming.

This was reported by a number of cases, got into the newspaper. Lieutenant Lee reported that the perpetrators of the murder were not apprehended, but the land was never recovered.

It became the Hill Ranch, and then the Olinghouse Ranch, and then the Ceresola Ranch, and the Indians were always deprived of it and they were discouraged from attempting to recover this land over which an Indian had been shot.

Q. A few minutes ago when you were discussing the Ormsby Agreement, you mentioned that—I think you used the term "they agreed to [8570] sell the reservation."

A. Yes.

Q. Is that what you meant?

A. They sold a part of the reservation.

Q. Now —

THE COURT: I believe you said two townships, did you not?

THE WITNESS: It was two townships. Usually they say ten miles, but since it was never actually consummated, the exact distance is not easily described.

Q. BY MR. THORP: Where would this portion of land have been located on the reservation?

A. It would be from the southern tip of Wadsworth up to the township boundary, almost two townships, down the river, but it was not a full two townships broad, or one township broad.

The reservation in that area is not six miles wide.

* * * *